SUPREME COURT, U.S.

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Supreme Court of the United States

October Term, 1956

No. 4

CLAUDE MACK LIGHTFOOT,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

JOHN J. ABT,
11 Park Place,
New York 7, N. Y.,
Attorney for Petitioner.

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Supreme Court of the United States

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No. 32

CLAUDE MACK LIGHTFOOT,

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THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 619) [1] is reported at 228 F. 2d 861.

Jurisdiction

The Court has jurisdiction under 28 U. S. C. 1254.

Statutes Involved

The pertinent portions of the Smith Act (18 U. S. C. 2385), the Internal Security Act (50 U. S. C. 783(f)) and the Communist Control Act (50 U. S. C. 841-43) are set forth in Appendix A.

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[1] "R." refers to the printed record. "G. Ex." designates an exhibit offered by the prosecution and "D. Ex." an exhibit offered by petitioner. "App." refers to an appendix to this brief.

Questions Presented

1. Whether the decision below that the evidence sustains the verdict violates accepted and constitutionally protected standards governing proof of guilt.

2. Whether the membership clause of the Smith Act (18 U. S. C. 2385) is unconstitutional on its face or as applied in this case.

3. Whether the trial court erred in denying petitioner's motion that the court inspect the contemporaneous report made to the F.B.I. by a prosecution witness, concerning the subject matter of his testimony, for the purpose of determining whether the report contradicted the testimony and should therefore be made available to the defense.

4. Whether the conviction and the affirmance below were based on evidence which should have been excluded as incompetent, irrelevant and remote.

5. Whether the trial court erroneously construed and applied the membership clause of the Smith Act and the indictment in instructing the jury that the teaching and advocacy to which the indictment refers is the teaching and advocacy of the Communist Party as an entity and not that of the members individually.

6. Whether the immunity conferred by section 4(f) of the Internal Security Act (50 U. S. C. 783(f)) bars prosecution of the offense charged in the indictment.

7. Whether the findings made by Congress with reference to the Communist Party in the Communist Control Act (50 U. S. C. 841-43) deprived petitioner of the right to a fair and impartial trial.

Statement of the Case

This case presents for review a judgment of the Court of Appeals for the Seventh Circuit which affirmed the conviction of petitioner, after a jury trial, under a one count indictment (R. 3) charging violation of the so-called membership clause of section 2 of the Smith Act. The clause proscribes membership in a society of persons who teach or advocate the overthrow or destruction of the government of the United States by force or violence, knowing the purpose thereof.

This case and *Scales* v. *United States*, 227 F. 2d 581, No. 29, this Term, involve the first trials under the membership clause.[2] The two cases present identical questions as to the constitutionality of the statute on its face, the effect of section 4(f) of the Internal Security Act as a bar to the indictments, and the effect of sections 2, 3 and 4 of the Communist Control Act on the right of the petitioners to a fair and impartial trial.

The Indictment

The membership clause of section 2 of the Smith Act, together with the organizing clause of the same section, provides:

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[2] There have been fourteen additional indictments under the membership clause: *United States* v. *Blumberg*, E. D. Pa.; *United States* v. *Noto*, W. D. N. Y.; *United States* v. *Weiss*, N. D. Ill.; *United States* v. *Russo*, Mass.; *United States* v. *Blum*, S. D. Ind.; *United States* v. *Hellman*, Mont.; *United States* v. *Dennis*, *United States* v. *Gates*, *United States* v. *Winter*, *United States* v. *Davis*, *United States* v. *Stachel*, *United States* v. *Thompson*, *United States* v. *Hall*, *and United States* v. *Foster*, all S. D. N. Y. Trials in the *Blumberg* and *Noto* cases have resulted in convictions. None of the other cases has been tried. District Judges in the *Weiss*, *Russo* and *Hellman* cases have continued the trials until after the Court has disposed of this case and the *Scales* case.

"Whoever organizes or helps or attempts to organize any society, group or assembly of persons who teach, advocate or encourage the overthrow of any such government [in the United States] by force or violence; or becomes or is a member of, or affiliates with any such society, group or assembly of persons, knowing the purpose thereof—Shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *."[3]

The indictment (R. 3), returned on May 14, 1954, charges in two paragraphs of a single count:

1. That, continuously since July 26, 1945, the Communist Party of the United States has been "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the government of the United States by force and violence as speedily as circumstances would permit."

2. That, continuously since July 26, 1945, the petitioner has been a member of the Communist Party "well knowing" that it is a society, group and assembly of persons who teach and advocate the doctrine alleged in paragraph 1, "and said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit."

The Motions to Dismiss the Indictment

The petitioner moved to dismiss the indictment on the grounds that, (a) the membership clause of the Smith Act is unconstitutional, (b) the indictment was barred by

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[3] A 1954 amendment to section 349 of the Immigration and Nationality Act provides that a citizen shall forfeit his nationality upon conviction under this section. 8 U. S. C. 1481(a)(9). P. L. 766, 84th Cong., 2d Sess., increases the maximum penalty to $20,000 or twenty years, or both. Section 121(a) of P. L. 880, 84th Cong., 2d Sess., authorizes the imposition of an additional penalty of forfeiture of the accumulated social security credits of the defendant.

section 4(f) of the Internal Security Act, and (c) the Congressional findings of the Communist Control Act denied him a fair and impartial trial (R. 5, 6). The motions were denied (R. 7).

The Issues of Fact

Petitioner's membership in the Communist Party during the indictment period was conceded (R. 10).

The issues of fact for the jury, therefore, related exclusively to the petitioner's knowledge and intent, *i.e.*:

1. Whether he knew the Communist Party as a society of persons who advocated the overthrow of the government by force and violence as speedily as circumstances would permit; and

2. Whether he intended to bring about such overthrow by force and violence as speedily as circumstances would permit.

As the trial court instructed the jury (R. 581-82), the teaching and advocacy alleged in the indictment concerns expressions calculated to incite persons to take the action advocated and not merely to induce discussion or belief.

As the trial court further instructed the jury (R. 580), the prosecution was required to establish that the petitioner had guilty knowledge and intent at some time between May 14, 1951 and May 14, 1954, the three-year statutory period next preceding the return of the indictment.

The Evidence

The prosecution called eight witnesses whose testimony is material.[4] All were former members of the Communist

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[4] Four other witnesses identified documents which established that, as conceded, petitioner was a member and officer of the Communist Party during the indictment period (R. 16-28; G. Exs. 1-16). The testimony of an additional witness was excluded because it related to matters subsequent to the indictment (R. 31) and that of another was stricken as remote (R. 472).

Party. Five had joined at the request of the F.B.I. to spy on the organization and had received monies from it.[5] A sixth, Lautner, is a full-time professional witness for the Department of Justice in anti-Communist cases (R. 215).

One witness (Meyer) testified to conversations with the petitioner in the period from 1934 to 1942. Six testified to their attendance at meetings or classes where they saw the petitioner or heard him speak. The testimony of the remaining witness (Lautner) was confined to giving his "expert" opinion as to the aims and objectives of the Communist Party and the meaning of the term, Marxism-Leninism. (See *infra*, pp. 13-15.)

The prosecution introduced exhibits consisting primarily of the constitution of the Communist Party (G. Ex. 45; R. 263); excerpts from the so-called "classics" or basic writings of Marxism-Leninism, including the *Communist Manifesto,* first published in 1848 and books by Lenin and Stalin, the most recent of which was written in the early 1920's (G. Exs. 18, 19, 21, 23, 25, 41; R. 209, 227, 229, 231); the *History of the Communist Party of the Soviet Union,* published in 1938 (G. Ex. 22; R. 209, 227, 229, 231); and published writings of the petitioner (G. Exs. 57, 58, 59, 60, 63, 64, 66; R. 344-46, 363).

Petitioner's affirmative case was confined to the introduction of one exhibit and the reading of portions of exhibits offered by the prosecution (D. Ex. 3; R. 473, 476-80, 486-87).

All that the evidence established with reference to the petitioner was (a) that for many years he had been a member and officer of the Communist Party and had taught in its schools; (b) that he knew that the Communist Party based itself on the principles of Marxism-Leninism, (c) that he was an adherent of these principles and (d) that he was familiar with excerpts from the "classical" writings of Marx, Engels, Lenin and Stalin offered in evi-

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[5] Herron (R. 34, 52), Cummings (R. 434), Czarnowski (R. 317, 387-89), Ondrejka (R. 303), and Brzek (R. 452, 463).

dence by the prosecution. There was no evidence that the petitioner had ever advocated the violent overthrow of the government or stated that it was his intention to bring about such overthrow. Nor was there evidence that petitioner had ever stated that he understood the program of the Communist Party or of Marxism-Leninism to include the advocacy of violence or had acquiesced in a statement to that effect by any other person.

Moreover, the prosecution's "expert" witness did not testify that in his opinion the Communist Party or the teachings of Marxism-Leninism advocated the violent overthrow of the government.[6] On the contrary, he stated (R. 281) that it was the position of the Communist Party that if, at some future time, the transition to socialism in this country could not be realized peacefully by elections and parliamentary means, it would only be because the trusts and monopolies would try to prevent such social change by force and violence.

The prosecution's theory of the case, concurred in by the trial judge (R. 595-96) and by the court below (R. 624-26), was that the excerpts introduced by it from the "classical" writings of Marx, Engels, Lenin and Stalin, as it interpreted them, advocate the violent overthrow of capitalist governments as speedily as circumstances permit; that (notwithstanding the testimony of its "expert") this interpretation of the "classical" literature and current incitements to overthrow the government of the United States could be ascribed to the Communist Party solely by virtue of the latter's acknowledged adherence to the principles of Marxism-Leninism; and that guilty knowledge and intent on the part of the petitioner could be inferred

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[6] In this respect, Lautner's testimony differed sharply from that given by him in the other Smith Act cases, now before the Court. *Yates* v. *United States*, 225 F. 2d 146, Nos. 6-8, this Term; *Mesarosh* v. *United States*, 223 F. 2d 449, No. 20, this Term, and *Scales* v. *United States*, *supra*.

from his publicly stated belief in these principles and his knowledge of his party's adherence to them.

In what follows, we describe the evidence in detail.

(1) Acts and Declarations of the Petitioner

The evidence of acts and declarations by the petitioner falls into four categories: (a) testimony as to his attendance at meetings where he or other Communists spoke; (b) testimony as to his teaching in Communist Party schools; (c) testimony as to his conversations with others, and (d) exhibits containing his published speeches and writings.

(a) Prosecution witnesses testified as to petitioner's attendance at a total of sixteen meetings from November, 1945 to June, 1951 (R. 43-44, 305-10, 334-35, 346-64, 370-72, 437-38). Only three of these (one in May and two in June, 1951) took place within the three years next preceding the indictment (R. 307-10, 334-35, 370-72). For the convenience of the Court, we have summarized the testimony concerning each meeting in Appendix B. If this testimony is accepted in its entirety,[7] it establishes no more than that the petitioner or other speakers called for the building of the Communist Party, particularly among the Negro people and working people; urged Communists to work more effectively in trade unions and veterans' organizations; expressed their desire for and confidence in the eventual establishment of socialism in this country; praised the Soviet Union and its leaders, and opposed the Marshall Plan and the cold war policies of the Truman adminis-

[7] Twelve of the sixteen meetings, covering the period from 1945 to 1951, were the subject of the uncorroborated testimony of the witness Czarnowski who had been a paid informer throughout that period and, for the four years prior to his appearance on the stand, had derived substantially all of his income from the F.B.I. (R. 386, 399-400). His memory was obviously faulty (*e.g.*, R. 382-86, 395-97) and he admitted that "I think I have got mixed up in some of these meetings" (R. 358).

tration. Additionally, at a meeting in 1947, petitioner was said to have stated that he would not make organization records available to a legislative investigating committee, and to have advised Communists not to reveal their membership publicly if to do so would jeopardize their positions in the community (R. 350-51).[8]

(b) Three witnesses testified that they had attended classes taught by petitioner in Communist Party schools, the most recent of which was held seven years prior to the indictment.

The witness Meyer, a member of the Communist Party from 1934 to 1945, holds bachelor's and master's degrees from Oxford University and did graduate work at the London School of Economics and the University of Chicago (R. 56, 58, 93). From 1938 to 1941, he was the director of the Chicago Workers School, where petitioner taught courses on Marxism-Leninism, the History of the Communist Party of the Soviet Union, and political economy (R. 63, 68). Meyer testified that he made it a practice to attend the classes of all teachers, including petitioner, at least once or twice each term (*ibid*). However, he was not asked about, and gave no testimony concerning the petitioner's teaching.

The witness, Miss Skinner, a member of the Communist Party from 1946 to 1948, had been a clerical worker in the Chicago District Office of the Party (R. 448).[9] In 1946 she took a course in the fundamentals of Marxism, taught by the petitioner in the Abraham Lincoln School (R. 450). In the summer of 1947, she attended a Communist Party School at Lake Ivanhoe, Wisconsin, where the petitioner taught classes in "strategy and tactics" and "history and role of the Party" (R. 450; G. Ex. 54). She was not asked

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[8] The court below characterized the latter statement as advice to "the membership on the use of the underground" (R. 621).

[9] Skinner and Meyer were the only prosecution witnesses (other than the "technical" witnesses) who were not paid F.B.I. informers.

about, and gave no testimony concerning, the petitioner's teaching in any of these classes.

The witness Brzek followed Miss Skinner to the stand. An informer who joined the Communist Party to spy on it at the request of the F.B.I. (R. 452), he testified that he, like Miss Skinner, had attended the 1947 summer school at Lake Ivanhoe (R. 454). He was unable to recall the names of any of the courses taught at the school until he was shown a mimeographed schedule of classes (R. 456-57, 464-65). Nor could he recall what he was taught in classes other than the Lightfoot classes (R. 467). His story concerning the petitioner's teaching contains the only reference to violence in all of the testimony. It is impossible to paraphrase the witness' semi-literate statement, which appears at R. 460-62. Its essence is contained in the following excerpt:

> "He then spoke on, that we would approach this [10] to avoid bloodshed, but those who had the control wouldn't want to give up.
>
> "However, in capitalistic wars, it is not the capitalists that their blood is spilled. However, in this case it would be their blood.
>
> "Then he went on to explain that it wouldn't be a shooting, it would be more quiet methods of doing that blood end of it.
>
> "The bloodshed end, the bloodshed, it wouldn't be by, say, shooting firearms, to be by a more quiet method. • • •
>
> "He approached us again with, as I remember it, that we will try to avoid bloodshed and we will approach it to avoid bloodshed.
>
> "However, we will not be pushed off. If we have to spill blood, we will.
>
> "That was the last thing he said, that was his actual words, 'If we have to spill blood, we will.'"

Brzek testified that he had made a written report of this episode to the F.B.I. (R. 467-68). The petitioner moved

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[10] The "this" has no antecedent in the testimony of the witness.

for the production of the report in order that the trial court might inspect it to determine whether it contradicted the testimony of the witness and should be made available to the defense (R. 468, 472). The trial court denied the motion (R. 472).

(c) Two witnesses, Miss Skinner and Meyer, testified to their presence at conversations with petitioner.

Miss Skinner stated that in the year 1947-48 when she was a clerical worker in the Chicago District Office, petitioner came to the office approximately once a month and talked with practically everyone there, including the Communist Party officials of the Chicago District (R. 448-49). She was not asked about, and did not testify concerning, any of these conversations.

Meyer knew and worked with the petitioner in the Communist Party from 1934 to 1942 (R. 61). Early in this period both men were members of the district bureau of the Young Communist League. Later, they served together on the section committee of the South Side section of the Communist Party where they were in charge of the day-to-day work in that area (R. 60, 62-63, 110). They also collaborated on a pamphlet dealing with the position of the Party on the Negro question (R. 110). In addition, as we have noted, they were associated as director and teacher in the Workers School. Meyer described their relationship during these eight years by stating that, "We worked very closely together during a considerable part of the period, and on a reasonably close basis in other parts of the period" (*ibid.*).

The two men discussed theoretical and educational problems of Communism on many occasions (R. 71). In 1940, they engaged in a series of discussion concerning changes in the method of teaching advanced political courses in the Workers School. In that connection, they reviewed the textbooks for these courses, including the *History of the Com-*

munist Party of the Soviet Union, and the "classical" works of Marx, Engels, Lenin and Stalin. Meyer was able to identify the specific passages of the books which he and the petitioner discussed (R. 96-108; G. Exs. 18, 19, 21, 22, 23, 25, 41). He testified that their conversations resulted in agreement "upon what should be taught and how it should be taught" (R. 97).

However, Meyer was not asked and did not testify about the content of the teaching which was agreed upon, or concerning the petitioner's interpretation of these books or his understanding of the application of the passages they discussed to the United States. Nor, with a single exception, was the witness questioned or did he testify as to the content of any other conversation with or statement by the petitioner during the eight years of their intimate association. The exception (R. 114-15) has no relevance whatsoever to petitioner's understanding of the attitude of the Communist Party or of Marxism-Leninism toward the use of force or violence as a means of bringing about social change.

(d) The prosecution introduced a number of the petitioner's published speeches and writings (G. Exs. 57, 58, 59, 60, 63, 64, 66; R. 344-46, 363, 374-80). These deal with methods for building and strengthening the Communist Party, the struggle to eliminate discrimination and violence against the Negro people, the necessity of averting war, the desirability of negotiating a cease-fire in Korea, the significance for the American people of the achievements of the Soviet Union, and other topical political questions. They contain no discussion of the means by which socialism can or should be brought about in this country and, far from advocating violence in any form or for any purpose, demonstrate petitioner's opposition to all forms of violence, including the violence practiced against his people, the Negro people, and the violence of war.

The petitioner's writings avow the author's adherence to the principles of Marxism-Leninism. They contain the only evidence in the entire record concerning his understanding of the meaning and application of these principles. He wrote (R. 475, emphasis supplied):

> "Marxism-Leninism gives us the power of orientation. It enables us to perceive the direction in which things are heading. *It does not, nor can it determine, for us before hand, the form nor the exact time of a new social development.*"

(2) The Opinion Testimony

Lautner testified as an "expert" for the prosecution. His only testimony concerning the petitioner was that he had "checked him in" as a delegate to the 1948 national convention of the Communist Party (R. 170).

Lautner joined the Communist Party in 1929 (R. 132) and held various full-time positions in the organization until his expulsion in 1950 (R. 169), more than four years prior to the indictment. After a year of unemployment, he was employed by the Department of Justice as a "consultant". From January 1951 until his appearance as a witness, he was on the payroll of the Department at a rate of $20 or $25 a day [11] for five days a week as a professional witness in anti-Communist cases (R. 215, 219-21).[12]

Although Lautner had been a full-time official of the Communist Party for over twenty years, had attended a number of its conventions and had studied in its national training school (R. 133, 143, 150-51), he did not testify to any statements made on behalf of the organization or by any of its officers, teachers or members. Instead, the prosecution confined itself to eliciting his opinion concerning the meaning of Marxism-Leninism and the aims and ob-

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[11] Plus $9 a day for expenses (R. 221).

[12] During his twenty years in the Communist Party, Lautner's earnings ranged from nothing to a maximum of $60 a week (R. 214).

jectives of the Communist Party.[13] This opinion testimony was admitted over objection as to its relevance and competence and notwithstanding the fact that the witness conceded that he was not an expert on the Communist Party and that even those who consider themselves experts sometimes disagree as to whether a writing or statement conforms to the principles of Marxism-Leninism (R. 273-75). Moreover, Lautner was permitted to give his opinion as to the aims and objectives of the Communist Party subsequent to his expulsion in 1950, although his only knowledge of its activity and advocacy after that date was derived from reading its publications (R. 172).[14]

Lautner did not express the opinion that Marxism-Leninism or the Communist Party advocated the violent overthrow of the government. On direct examination, he testified that Marxism-Leninism:

> "* * * is the writings of Marx, Engles, Lenin and Stalin and its application in this period, this present period, known as Imperialism, and the theory and documentation of 'The Proletarian Revolution' in general, and the theory and practice of the dictates [sic] of the proletariat in particular" (R. 205-06).

He further stated that the "final aim" of the Communist Party:

> "* * * is the destruction of the existing social order known as imperialism in this particular period, this era, the destruction of imperialism and its governments, and instituting instead through the prole-

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[13] In this respect, also, Lautner's testimony here differs from that given by him in the *Scales*, *Yates* and *Mesarosh* cases, *supra*.

[14] Thus, he did not believe himself qualified to state whether or not passages in the *History of the Communist Party of the United States*, by William Z. Foster, the Party's chairman (D. Ex. 3), advocating the transition to socialism in the United States by peaceful, democratic means, represented an authoritative statement of the position of the Communist Party in 1952 when the book was written (R. 288-89).

tarian revolution and the dictatorship of proletariat, socialism.

"In the United States, being the leading imperialist country, these aims pertain as the basic aims of the Communist Party in the United States" (R. 211).

On cross-examination, the witness testified that the Communist Party taught that the practical application of the principles of Marxism-Leninism were always dependent upon the conditions existing at the time and place in question, and hence that passages from Communist literature could not be applied to any and all situations. He further testified that the Communist Party worked for the election of a broad peoples' front coalition government to maintain and preserve democratic rights and liberties, while at the same time it sought to persuade the American people that ultimately socialism would be superior to the present system. Finally, he testified that the position of the Communist Party was that if socialism could not be established in this country by peaceful electoral means, it would only be because the trusts and monopolies would use force and violence to prevent this result (R. 277-81).

(3) The "Classical" Communist Literature

Over the petitioner's objection, the trial court admitted into evidence excerpts from the writings of Marx, Engels, Lenin and Stalin,[15] the *History of the Communist Party of the Soviet Union*, a book by Soviet authors dealing with the history of the Russian Communist Party and its predecessors from 1883 to 1937 (G. Ex. 22), and an article writ-

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[15] The books from which these excerpts were taken and their original publication dates are: Marx and Engels, *The Communist Manifesto*, 1848 (G. Ex. 18); Lenin, *What Is To Be Done*, 1902 (G. Ex. 41); Lenin, *State and Revolution*, 1917 (G. Ex. 23); Lenin, *Left Wing Communism*, 1920 (G. Ex. 25); Stalin, *Foundations of Leninism*, 1924 (G. Ex. 19); Stalin, *Problems of Leninism*, 1926 (G. Ex. 21).

ten by William Z. Foster in 1945 (G. Ex. 48). Some of these excerpts were in no way connected with the petitioner but were referred to by the witness Lautner as "documenting" his opinion testimony as to the meaning of Marxism-Leninism (R. 206-09) and were received for the limited purpose of their relevance, if any, to such opinion testimony (R. 227-28). Other excerpts were admitted on the basis of the testimony of Meyer that he had discussed them with the petitioner in connection with courses taught by the latter at the Workers School (R. 72, 80-81, 97-108, 228-31). As we have seen, however, there was no testimony by Meyer or any other witness as to petitioner's understanding or interpretation of the latter excerpts or as to how he used or applied them in his teaching.

The excerpts offered in evidence are but small fragments torn from a voluminous body of Communist literature in which the theory and practice of what is known as scientific socialism is set forth and developed. All of the books from which the excerpts were taken were currently on public display and sale at a Chicago bookstore (R. 392). The authors of the works in question have always emphasized that, as in the case of any other science, the propositions of scientific socialism and their application are in a constant state of development and change in the light of changes in objective conditions and the accumulation of experience.

Thus, in a preface written 25 years after the appearance of the *Communist Manifesto,* Marx and Engels wrote (G. Ex. 18):

> "The practical application of the principles [of scientific socialism] will depend, as the Manifesto itself states, everywhere and at all times, on the historical conditions for the time being existing * * *."

Similarly the authors of the *History of the Communist Party of the Soviet Union* warned (R. 474-75):

"It may seem that all that is required for mastering the Marxist-Leninist theory is diligently to learn by heart isolated conclusions and propositions from the works of Marx, Engels, and Lenin, learn to quote them at opportune times, and rest at that, in the hope that the conclusions and propositions thus memorized will suit each and every situation and occasion. But such an approach to the Marxist-Leninist theory is altogether wrong * * *. Mastering the Marxist-Leninist theory means being able to enrich this theory with the new experience of the revolutionary movement, with new propositions and conclusions, it means being able to develop it and advance it without hesitating to replace—in accordance with the substance of the theory—such of its propositions and conclusions as have become antiquated by new ones corresponding to the new historical situation."

(4) The Current Teaching and Advocacy of the Communist Party

Apart from Lautner's opinion testimony, the only evidence in the record concerning the teaching and advocacy of the Communist Party on the transition from capitalism to socialism in the United States is contained in two exhibits.

The first, the current party constitution, introduced by the prosecution, states that the ultimate objective of the organization is "the establishment of socialism by the free choice of a majority of the American people." It further provides for the expulsion of any member "who advocates force and violence or terrorism" (G. Ex. 45; R. 479).

The second exhibit is the *History of the Communist Party of the United States,* by William Z. Foster, published in 1952, and identified by a prosecution witness as containing an authoritative statement of the position of the Communist Party on various questions of the day (D. Ex. 3; R. 426-27). The book contains a detailed outline of the party's teaching and advocacy concerning what

the author calls "the American road to socialism," involving the transition from capitalism to socialism by peaceful, democratic processes (R. 476-79). While emphasizing that this outline is not a blueprint for the eventual establishment of socialism in the United States, Foster concludes:

> "What stands out clearly in this analysis, however, is that in its perspective for ultimate socialism in the United States, the Communist Party, as the Supreme Court, with a rare exhibition of objectivity, clearly stated in the *Schneiderman* case of 1942, always strives for a peaceful and democratic course to socialism, supported at all times by a huge majority of the American people."

The Conviction and Sentence

The trial judge reserved decision on petitioner's motion for judgment of acquittal until after the verdict. He stated however that he felt himself bound by the decisions in Smith Act conspiracy cases which, as he put it, "modified the rules of evidence that I have known anything about for the last number of years" and changed the law as he had practiced it during his many years on the bench (R. 472-73, 480-81).

Accordingly, after the return of the verdict, he denied petitioner's motion and imposed sentence of five years' imprisonment and a fine of $5,000 (R. 610-11).

The Opinion Below

The court below held that the evidence was sufficient to support the verdict. It sustained the constitutionality of the statute, rejected petitioner's contentions with respect to section 4(f) of the Internal Security Act and the Communist Control Act and affirmed the evidentiary ruling of the trial court which petitioner urged required a reversal (R. 619-34).

Summary of the Argument

I. The decision below that the evidence sustains the verdict violates accepted and constitutionally protected standards governing proof of guilt.

A. There was no proof of guilty knowledge.

The evidence spanned 19 years of petitioner's life and membership in the Communist Party. Yet it was not shown that he had ever said, written or done anything to advocate revolutionary violence or to indicate an understanding, opinion or belief that the Communist Party did so. If petitioner had guilty knowledge, the prosecution was in a position to prove it by clear and convincing evidence. For the witnesses, Meyer and Skinner, attended many of his classroom lectures on the principles of Marxism-Leninism and participated in or were present at numerous private conversations in which he discussed these principles and the activities of the Communist Party. However, the prosecution sedulously avoided questioning either witness as to the content of petitioner's lectures or conversations.

The only reference by a prosecution witness to violence in any context was in Brzek's confused, illiterate and frequently unintelligible "bloodshed" story. If the story is credited, it establishes that, far from advocating violence, petitioner urged its avoidance and, at most, warned of a possible reluctant resort to force if necessary for self-defense.

The decision below that the evidence established guilty knowledge is based on a theory of guilt by imputation. The premise that the Communist Party advocated violence rests entirely upon the assumption that the court's interpretation of the "classical" literature constitutes a body of immutable dogma which may be currently imputed to the Communist Party by virtue of its acknowledged adherence to the principles of Marxism-Leninism.

The court imputed to petitioner knowledge of the teaching and advocacy which it thus imputed to the Communist Party from the bare facts that petitioner was an active member and officer of the organization, was familiar with the "classical" literature, urged its study, and used it in his classroom teaching.

The court below ignored the evidence which refutes its conclusion. The testimony of the prosecution "expert" Lautner, the constitution of the Communist Party, and Foster's *History* all prove for the purposes of this case that the Communist Party advocated a peaceful and democratic path to socialism in the United States. This evidence, which was uncontradicted, affirmatively establishes petitioner's innocence.

But even if the inferences indulged in below were not belied by the evidence they would nevertheless be completely unwarranted. The issue concerning the "classical" literature is not whether it can be reasonably interpreted as advocating violence, but whether the Communist Party, to petitioner's knowledge, so interpreted these writings and taught and advocated that this interpretation was currently applicable to the government of the United States. There is no evidence that the Communist Party, to petitioner's knowledge or otherwise, so interpreted the "classics" or so taught and advocated. On the contrary, the proof shows that the petitioner, like other Communists, and in agreement with the opinion in *Schneiderman* v. *United States*, rejects a dogmatic reading of the political polemics of Marx, Engels, Lenin and Stalin or their mechanical application to situations outside of the historical context in which they were written. Accordingly, even if it could be said that these authors unequivocally advocated violent overthrow as the precondition for the establishment of socialism during the period when they wrote, the imputation of such advocacy to the Communist Party and knowledge of it to petitioner during the indictment period would still be wholly unwarranted.

In fact, however, as *Schneiderman* held, the excerpts from the "classical" literature in evidence here are susceptible of an innocent interpretation. Under these circumstances, the reprehensible interpretation may not be imputed to petitioner in the absence of overt acts showing that such was his interpretation. The court below cited no such overt acts, and there were none.

Finally, it would not have been sufficient had the prosecution proved that, to petitioner's knowledge, the Communist Party advocated revolutionary violence as a matter of political theory. What was required was proof that petitioner knew the Communist Party to have been engaged in incitements to violence. Yet there is not a scintilla of evidence to that effect. The court below made no attempt to bridge the gap between study and discussion of the "classical" literature and current incitements to political violence "as speedily as circumstances would permit," but simply ignored the fact that incitement is an element of the offense.

B. There was no proof of intent.

The two elements of the crime charged—knowledge and intent—must each stand on its own footing. Membership in an organization with knowledge that it has an illicit objective does not prove guilty intent in the absence of conduct by the member which establishes that he joined for the purpose of effectuating that objective. There is no evidence of such conduct here. Petitioner's speeches, teaching, conversations and writings over a twenty-year period are devoid of advocacy of violence. The court below, however, found that guilty intent had been proved. It relied primarily on the same factors which it found established guilty knowledge: petitioner's years of active membership and devotion to the Communist Party, and his familiarity with its supposedly severe inner-party dis-

cipline. Exactly the same factors were rejected by the court in the *Schneiderman* case as proof that a Communist Party member believed in political violence. The only additional matter relied on below was a sentence—taken out of context—from the statement attributed to petitioner by Brzek. However, as shown above, that statement, if made, was entirely consistent with innocence.

It is apparent from the foregoing analysis of the record and the opinion below, that the conviction was sustained only by ignoring the evidence exonerating petitioner, and disregarding the presumption of innocence, the principle that guilt is personal, the constitutional protection accorded association and expression, and the provision of section 4(f) of the Internal Security Act that the holding of office or membership in a Communist organization shall not per se constitute a violation of any criminal statute.

II. The membership clause of the Smith Act is unconstitutional on its face and as applied by the court below.

The membership clause differs in decisive respects from the advocacy and organizing provisions of the Smith Act, sustained in *Dennis* v. *United States*. The latter punish individuals for their own acts or advocacy. The membership clause, on the other hand, does not require proof of any overt conduct other than the act of joining the organization. It does not penalize the accused for his advocacy, but for the advocacy of other members of the organization. It is not advocacy but association that the membership clause makes criminal. The holding in *Dennis* is therefore inapplicable. Indeed, under the rationale of that decision, the membership clause is unconstitutional on its face and as applied in this proceeding.

A. The membership clause contains no reference to the intent of the accused. Applied in accordance with its text, it authorizes the conviction of a member who does not believe in violent revolution but who joined the organization for some other and entirely legitimate purpose. So construed, the statute violates due process as well as the First Amendment.

The indictment seeks to remedy this defect by importing into the membership clause, as an element of the offense, a specific intent "to bring about such overthrow by force and violence as speedily as circumstances would permit." This effort to validate the statute is based on a fallacious application of the *Dennis* decision.

Dennis held that seditious intent was an unexpressed but necessarily implied element of the crimes defined in the advocacy and organizing provisions of the Smith Act because those who advocate or organize for violent overthrow obviously intend to bring about overthrow. But the nexus between act and intent which was the foundation for the result in *Dennis* is lacking in the case of the membership clause. It cannot rationally be said that because a person joins an organization knowing it to advocate violent overthrow, he must intend to accomplish that purpose. As the Court has pointed out in a number of cases, the member may have joined for an entirely different purpose. Accordingly, no inference as to intent can arise from membership in an organization with knowledge of its purpose. Moreover, a comparison of the varying treatment given the elements of knowledge and intent in the advocacy, organizing, literature distribution, and membership provisions of the Act demonstrates that the omission of intent from the membership clause was deliberate.

B. Even if the membership clause could be said to import intent as an element of the offense, it would nevertheless be unconstitutional for imputing guilt from association, unaccompanied by any overt act of wrongdoing. The membership clause represents the first Congressional attempt in our history to apply the "abhorrent" doctrine of guilt by association to citizens. In *De Jonge* v. *Oregon* and *Herndon* v. *Lowry*, the Court invalidated state legislation under which the accused were convicted for membership in the Communist Party, which was assumed to advocate political violence, in the absence of proof of any illegal act or illicit advocacy on their part. *American Communications Association v. Douds*, in reaffirming the doctrine of these cases, clearly foreshadowed the invalidity of the membership clause.

The court below decided the case as though it had arisen under the advocacy provisions of the Act, disregarding the fact that the offense defined in the membership clause rests solely on association. It also expressed agreement with the opinion in the *Scales* case which bypasses the problem of guilt by association as well as all other First Amendment questions by erroneously treating the membership clause as a statute punishing conspiracies to overthrow the government.

C. On its face and as applied, the membership clause fails to satisfy the clear and present danger test as formulated and employed in the *Dennis* case.

1. The conduct involved in a conspiracy to violate the advocacy and organizing provisions of the Smith Act, considered in *Dennis*, is of an entirely different order from that prohibited by the membership clause. The latter does not involve the element of conspiracy so that the factor which *Dennis* held "creates the danger" is lacking. Nor does it require proof that the accused engaged or planned to engage in any advocacy or organizational activity whatsoever. Indeed, the thrust of the clause is

against members who are completely passive or whose activity is confined to legitimate advocacy. But the membership of a single individual whose activity is so confined cannot constitute a danger to the government under any circumstances. The addition of such subjective factors as knowledge and intent (if the latter is an element of the offense) cannot increase the "danger" in the absence of any overt conduct beyond the bare act of association.

The Court in *Dennis* emphasized "the intent of the defendants, the nature of their activities" and "their power to bring about the evil" as decisive of the constitutional question. The membership clause authorizes the conviction of one who engages in no "activities," is powerless to "bring about the evil," and who need not be shown to have a seditious intent. Thus none of the constitutional requisites for a conviction under the advocacy and organizing provisions are elements of the offense created by the membership clause.

2. Under the *Dennis* decision, the application of the clear and present danger test to a Smith Act case requires determining whether the conduct of the defendant as established by the evidence, in the light of the international situation existing at the time of the indictment, gave rise to a clear and present danger of the violent overthrow of the government.

The evidence as to petitioner's activities during the three years preceding the indictment was that he had been a member and officer of the Communist Party, had spoken at three meetings and had written two articles. His written and spoken words contained nothing but legitimate political advocacy and could not be even remotely "dangerous." Moreover, the international setting in May, 1954, the date of the indictment, was characterized by the absence of any active battlefield in the world, a marked relaxation of international tensions and the recession of the war danger. Thus the background factors which the

Dennis case stressed as creative of the danger had ceased to exist as the time of the indictment here.

If, as *Dennis* holds, the application of the clear and present danger test requires weighing "the gravity of the 'evil' discounted by its improbability" against the values inherent in the First Amendment, the balance in this case demands a reversal of the conviction.

III. A reversal is required because of the denial of petitioner's motion that the trial court inspect Brzek's contemporaneous report to the F.B.I. concerning petitioner's lecture at the Ivanhoe, Wisconsin, school so that the Court could determine whether the report contradicted the testimony of the witness and should therefore be made available to the defense.

Brzek's attribution to petitioner of repeated references to bloodshed was inflammatory and prejudicial. Moreover, the prosecution leaned heavily on his testimony in its summation and the court below relied on it in holding that the evidence sustained the verdict. The prosecution did not deny the availability of the report or assert that its contents were privileged.

If the report in fact contradicted Brzek's testimony, petitioner was entitled to inspect it, use it in cross-examination and introduce it in evidence. The report itself contained the best, if not the only available, evidence of a contradiction. Petitioner's motion should therefore have been granted, as the decisions in a number of circuits hold. Disregarding these decisions, the court below erroneously treated petitioner's motion as one which asked for the immediate submission of the report to him, and affirmed the ruling of the trial judge on the ground that petitioner had failed to establish a contradiction between the report and the testimony.

Petitioner's motion was made before the prosecution rested. The suggestion below that it was untimely is

therefore without basis in fact.

The decision below is not only contrary to the great weight of authority in other circuits but violates the principle, fundamental to the administration of justice, that an accused should have access to evidence within the possession of the prosecution that the testimony of one of its witnesses is tainted.

IV. The erroneous admission of prosecution evidence requires a reversal.

A. Lautner's personal opinion concerning the aims of the Communist Party and the meaning of Marxism-Leninism was plainly irrelevant to petitioner's knowledge and intent, the only issues of fact for the jury. The Lautner opinion testimony was also incompetent, since, at most, it represented the witness' conclusion from the acts and declarations of unidentified third parties unconnected with the petitioner. Decisions admitting similar opinion testimony in Smith Act conspiracy cases are based on the co-conspirator rule and, if correct, are inapplicable to a case in which no conspiracy is charged. The erroneous admission of the Lautner testimony requires a reversal because it served as the foundation for the introduction in evidence of numerous prejudicial excerpts from the "classical" literature on which the case for conviction is staked.

B. The testimony of Meyer served only as a vehicle for the introduction of excerpts from the "classics" which he testified he had discussed with petitioner. The witness said nothing concerning the content of the discussion, petitioner's interpretation of the excerpts, or his understanding of their application to conditions in the United States. Inasmuch as the discussion took place prior to the enactment of the Smith Act, the Meyer testimony would have been of doubtful admissibility even if it had established guilty knowledge or intent at the time the dis-

cussion occurred. The testimony was clearly inadmissible because the bare fact that petitioner was familiar with certain Marxist books and had used them as class room texts prior to the Smith Act and fourteen or more years prior to the indictment had, at best, only the slightest relevance to his knowledge and intent during the indictment period. Under these circumstances, decisions sustaining the admission of pre-Act evidence in Smith Act conspiracy cases, if correct, are inapplicable, as the Court of Appeals in the *Dennis* case recognized.

C. If it was error to admit the Meyer and Lautner testimony concerning the excerpts from the "classics," the excerpts themselves should, of course, have been excluded. They were inadmissible for the additional reason that there was no evidence that petitioner (or, for that matter, the Communist Party or any of its members) had ever understood or taught that the "classical" literature advocated the violent overthrow of the government of the United States. The record shows only that petitioner and the Communist Party engaged in peaceable study, discussion and teaching of these writings. Such conduct is not and cannot be proscribed.

V. It was error to instruct the jury that the teaching and advocacy alleged in the indictment has reference to the teaching advocacy of the Communist Party as an entity and not to that of its member individually. The statute and the indictment do not refer to the advocacy of the organization but to that of "the persons who" are its members. Petitioner's request for an instruction to this effect was denied, and the instruction complained of was given instead.

Had Congress intended the test of guilt to be knowledge of the alleged advocacy of the organization as an entity, it could have said so in clear and unequivocal terms, as it has in other legislation relating to the same general subject matter. The distinction between the two

formulations is crucial since the acts or advocacy of an unincorporated association cannot be imputed to its members in the absence of authorization or ratification by them. Had petitioner's requested instruction been given, there could not have been a conviction, for there was no evidence that, to the knowledge of petitioner or otherwise, individual members of the Communist Party engaged in, authorized or ratified the proscribed advocacy.

VI. Prosecution of the offense charged in the indictment is barred by section 4(f) of the Internal Security Act which provides that, "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." It is obvious from the reference to "any other criminal statute" that Congress believed membership per se to be a crime under some law other than the Internal Security Act. The only other criminal statute on the books which might have been applicable to Communist Party members by virtue of their membership was the membership clause of the Smith Act. Since this statute makes knowledge that the organization has an illicit purpose an element of the offense, the term membership "per se" must have been intended to embrace membership with such knowledge. A contrary construction would render the reference to "any other criminal statute" meaningless.

This reading of 4(f) is confirmed by its legislative history. The reference to "any other criminal statute" was added to the section by an amendment on the floor of the House, only after repeated warnings in both the Senate and the House that the immunity conferred by the section in its original form was inadequate to assure the enforceability of the registration provisions of the bill because it did not provide immunity from prosecution under the membership clause of the Smith Act.

The fact that Congress intended section 4(f) to immunize Communists from prosecution under the membership clause is confirmed by the legislative history of the Humphrey amendment to the Communist Control Act. That amendment proposed to create a crime identical with the one charged in the indictment by making it an offense to be a member of the Communist Party with knowledge of its alleged seditious purpose. The amendment was defeated only because of representations by the Attorney General and Congressional leaders that its enactment would repeal an essential feature of the immunity conferred by 4(f) and nullify the registration provisions of the Internal Security Act.

The savings clause of the Internal Security Act does not override the reference in 4(f) to "any other criminal statute" since it is well established that a general savings clause cannot prevail over express provisions in the body of the enactment.

VII. The finding of Congress in the Communist Control Act that the Communist Party advocates the violent overthrow of the government deprived the petitioner of the right to a fair and impartial trial. By this finding, Congress predetermined one of the elements of the offense charged in the indictment, as construed by the trial court. It would be naive to suppose that a jury, presumed to know the law, would ignore this Congressional fiat. The damage from the finding could not have been discovered by *voir dire* questions or cured by instructions, both of which would only have resulted in specifically directing the attention of the jurors to the legislation.

Congress cannot have its cake and eat it by declaring a named organization to be engaged in criminal conduct while preserving the right to a fair trial of the precise issue it has predetermined by fiat. In fact, Congress had no reason to believe that the Communist Control Act

would give rise to this dilemma since, when it passed that act, it was of the opinion that the prosecution of Communists under the membership clause had already been barred by section 4(f) of the Internal Security Act.

ARGUMENT

I. The decision below that the evidence sustains the verdict violates accepted and constitutionally protected standards governing proof of guilt.

Under the indictment (R. 3) and the instructions of the trial court (R. 576, 581-82), the conviction of petitioner, an acknowledged member of the Communist Party, required proof beyond a reasonable doubt that, within the three-year statutory period, (1) the Communist Party, to the knowledge of petitioner, advocated the violent overthrow of the government in language calculated to incite persons to take the action advocated as speedily as circumstances would permit, and (2) the petitioner, personally, had the specific intent of bringing about the violent overthrow of the government as speedily as circumstances would permit.[16] Accepting the testimony of the prosecution witnesses in its entirety, there is no evidence which could conceivably support any of these elements of the offense, let alone all of them.

A. Knowledge

The prosecution evidence spanned 19 years of the petitioner's life and membership in the Communist Party.[17] Eight of these years were covered by the testimony of

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[16] We later show that the intent charged in the indictment has no foundation in the membership clause, and that the latter is unconstitutional on its face because it does not make intent an element of the offense.

[17] From 1934, when Meyer met him (R. 61) to 1953, the date of an article written by him (G. Ex. 66; R. 345).

Meyer, who worked with petitioner intimately from 1938 to 1942, as a fellow-member and officer of the Communist Party of Illinois (R. 61). During the 11 years that followed, the Communist Party and the petitioner were under the close and continuing surveillance of the F.B.I. and its informers.[18] As we have seen, during this nineteen-year period, the prosecution witnesses had heard or observed the petitioner teach in Communist Party classes, address or attend Communist Party meetings and conventions and participate in numerous private conversations (supra, pp. 8-13).

Yet, the prosecution could produce no evidence that the petitioner had ever said, written or done anything to advocate the violent overthrow of the government or to express an understanding, opinion or belief that the Communist Party advocated such overthrow.

If the petitioner had understood the objectives of the Communist Party or the principles of Marxism-Leninism to include advocacy of the violent overthrow of the United States Government, the prosecution had ample opportunity to prove that fact by direct, clear and convincing evidence. For, as we have seen, two of the prosecution witnesses, Meyer and Skinner, had attended petitioner's classes on "Marxism-Leninism", "the fundamentals of Marxism" and "strategy and tactics" (R. 68, 450). In addition, Meyer held an extended series of discussions with the petitioner concerning the content of courses on Marxism-Leninism in which agreement was reached on "what should be taught and how it should be taught" (R. 71, 79-80, 97). Moreover, Miss Skinner had been present during numerous private conversations between petitioner and his associates in the leadership of the Illinois Communist Party (R. 448-49). Clearly, if the petitioner had understood the tenets of the

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[18] Czarnowski, Cummings and Brzek joined the Party in 1943, Herron in 1944 and Ondrejka in 1949, all for the purpose of spying on it at the request of the F.B.I. (see *supra*, p. 6).

Communist Party and of Marxism-Leninism as embracing advocacy of the violent overthrow of our government, he would have said so in the course of his teaching and intimate discussions. The prosecution, however, sedulously avoided questioning either witness as to the content of these class room lectures and private conversations.

The writings of the petitioner offered in evidence by the prosecution contain lengthy statements of Communist Party policy and numerous references to the principles of Marxism-Leninism. But none of them even remotely suggests the advocacy of force and violence. Indeed, the only relevant reference to Marxism-Leninism makes it plain that the petitioner understood it to eschew all dogmas, including all preconceptions as to the form or time of a new social development (R. 475).

The only reference by a prosecution witness to violence in any context occurred in the testimony of the informer, Brzek (supra, pp. 10-11). The witness' version of petitioner's remarks in two class-room lectures delivered eight years before the trial and well outside the three-year statutory period cannot possibly give support to the conviction. Brzek's story was confused, illiterate and frequently unintelligible, as when he quoted the petitioner as saying (R. 462), "the bloodshed end, the bloodshed, it wouldn't be by, say, shooting firearms, to be by a more quiet method." It is by no means clear that the prospective conflict which was the alleged subject of the petitioner's remarks would involve the government. For, immediately before mentioning "the bloodshed end," Brzek quoted the petitioner as saying (R. 461) that Communists would be needed "wherever *these strikes* would occur."

In any event, whatever the nature of the conflict about which the petitioner is supposed to have spoken or the identity of the participants, it appears from Brzek's testimony that far from advocating violence, the petitioner urged its avoidance. Thus, the witness quoted the petitioner as saying that "we would approach this to avoid blood-

shed," and again "we will try to avoid bloodshed and we will approach it to avoid bloodshed" (R. 461-62). The additional alleged comment (R. 462), "However, we will not be pushed off. If we have to spill blood we will," indicates that, at most, petitioner warned of the possibility of a reluctant resort to force if necessary for self-defense.

While the Court below referred to the Brzek testimony in discussing petitioner's intent (R. 626),[19] its decision that the evidence established guilty knowledge rests entirely on a theory of guilt by imputation.

The Court's theory starts with the premise that, "The Party taught that to reach the goal of the 'Proletarian Revolution and the Dictatorship of the Proletariat,' actual class revolt would be necessary, and violence and bloodshed inevitably would result" (R. 622). The opinion does not and cannot support this conclusion with evidence of any declaration to that effect by the Communist Party or one of its officers or members, either before or during the statutory three-year period. The reasoning on which the conclusion is based appears to be the following: (1) The excerpts in evidence from the "classical" writings of Marx, Engels, Lenin and Stalin, as the Court construed them, "advocated the violent overthrow of capitalist governments as speedily as circumstances would permit" (R. 625). (2) Since such advocacy appears in the "classical" literature, it is a permanent and immutable dogma of Marxism-Leninism, applicable to all capitalist governments, including the United States, under all circumstances. (3) Since the Communist Party acknowledged its adherence to the principles of Marxism-Leninism (R. 622), current advocacy of the violent overthrow of the United States government may therefore be imputed to it.

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[19] It distorts the significance of this testimony by divorcing the petitioner's supposed comment, "if we have to spill blood we will", from the context in which it allegedly was made.

The Court below then found that petitioner was an active member and officer of the Communist Party, was familiar with the "classical" literature, urged its study, and taught in Communist Party schools. From these bare facts, it imputed to petitioner knowledge of the teaching and advocacy which it had imputed to the Communist Party (R. 624-25).

The theory of guilt relied on by the Court below flies in the face of the evidence.

The Court indulged in a tenuous series of inferences to conclude that the Communist Party advocated the violent overthrow of the government. But it completely ignored the direct evidence on the subject, all of which refutes its conclusion.

The opinion (R. 622) paraphrases Lautner's testimony on direct examination that the "final aim" of the Communist Party "is the destruction of the existing social order known as imperialism * * * and its governments, and instituting instead through the proletarian revolution and the dictatorship of the proletariat, socialism" (R. 211). This statement of the objective of the Communist Party is entirely consistent with the advocacy of a peaceful path to socialism. For, as the trial court instructed the jury (R. 583) the words "revolution" and "destruction" do not imply the use of force or violence.[20] Moreover, the opinion disregards the fact that any ambiguity in Lautner's direct testimony was disspelled on cross-examination when the witness testified as follows (R. 281):

> "Q. Was it not also the position of the Communist Party [from 1945 to 1950] Mr. Witness, that if socialism could not be peacefully established in the United States by elections and parliamentary methods, the reason would be that the trusts and monop-

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[20] "Revolution" is defined as "a radical change in social or government conditions". Webster, *New International Dictionary*. And the Smith Act itself speaks of the "destruction of any such government *by force or violence*". (Emphasis supplied.)

olies would try to prevent this by force and violence? A. That is what the Communist Party said, yes."

Thus the "expert" for the prosecution unequivocally stated that the Communist Party advocated the transition to socialism in the United States by peaceful and democratic means.

The Court below also ignored the only two statements in evidence by the Communist Party, its officers or members, concerning the methods for the achievement of socialism in this country.

First, the current constitution of the Communist Party, introduced by the prosecution, recites in a preamble that the organization "upholds the achievements of American democracy and defends the United States Constitution and its Bill of Rights against its reactionary enemies who would destroy democracy and popular liberties." It states that, among the purposes of the organization, is "the establishment of socialism by the free choice of a majority of the American people." Furthermore, it specifically provides for the expulsion of any member "who advocates force and violence or terrorism, or who adheres to or participates in the activities of any group or party which conspires or acts to subvert or undermine, weaken or overthrow any or all institutions of American democracy through which the majority of the American people can maintain their right to determine their destinies." (G. Ex. 45; R. 479-80.)

Second, as we have seen (*supra*, p. 17), the fact that the Communist Party advocated a peaceful path to socialism in the United States is also established by William Z. Foster's authoritative *History of the Communist Party of the United States*, published in 1952 (D. Ex. 3; R. 476-79).

The prosecution offered no evidence to contradict the unequivocal statements contained in the constitution and the Foster book or that those statements were not intended to mean and were not understood by the petitioner and

other Communists to mean exactly what they say. On the contrary, as we have shown, the testimony of the prosecution's own "expert" fully corroborated this documentary evidence.

Thus the record refutes the inference, drawn by the Court below from its reading of the "classical" literature, that the Communist Party advocated violent overthrow. In fact, the evidence proves the contrary and thereby establishes petitioner's innocence.[21]

But even if the inferences indulged in below were not belied by the evidence, they would nevertheless be completely unwarranted.

The issue concerning the excerpts from the "classical" literature is not whether a court or jury could reasonably interpret them as advocating the violent overthrow of capitalist governments. The issue is whether the Communist Party, to petitioner's knowledge, so interpreted them and taught and advocated that this interpretation was currently applicable to the government of the United States. *Schneiderman* v. *United States*, 320 U. S. 118, 153-54. Yet there is no evidence whatsoever that the Communist Party or petitioner understood the "classics" to advocate violence. Nor is there any evidence as to what the Communist Party or the petitioner taught concerning

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[21] The opinion below states (R. 624) that other courts have held "that evidence substantially the same to that appearing in the record before us" warranted a finding that the Communist Party advocated violent revolution. It cites *United States* v. *Dennis*, 183 F. 2d 201; *Frankfeld* v. *United States*, 198 F. 2d 679; *United States* v. *Mesarosh*, *supra*, and *Scales* v. *United States*, *supra*. We believe it unnecessary to discuss the accuracy of this statement or the validity of the findings made on the evidence introduced in the cases relied on by the court below. The *Mesarosh* and *Scales* cases will be reviewed by the Court at this term. And of course, for the purposes of this case, the nature of the advocacy of the Communist Party must be determined exclusively on the record made here. As as have shown, the uncontradicted evidence in *this* record establishes that such advocacy was innocent.

the current application to the United States of these political polemics of German and Russian Communists, written a quarter of a century to a century ago. In the absence of such evidence, the fact that the Communist Party and petitioner recommended study of the literature, used it in class room teaching and avowed their adherence to the principles of Marxism-Leninism does not have the slightest tendency to prove that the Communist Party advocated proscribed doctrine, much less that petitioner had knowledge that it did so.

In *Schneiderman* v. *United States*, *supra*, the government relied on the same excerpts from the works of Marx, Engels, Lenin and Stalin which are in evidence here.[22] In holding that the excerpts failed to establish that Schneiderman or the Communist Party advocated violent overthrow, the Court said (at 154-55):

> "In the first place this phase of the government's case is subject to the admitted infirmities of proof by imputation. The difficulties of this method of proof are here increased by the fact that there is, unfortunately, no absolutely accurate test of what a political party's principles are. Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written. Philosophies cannot generally be studies in vacuo. Meaning may be wholly distorted by lifting sentences out of context, instead of construing them as part of an organic whole.[23] Every utterance of party

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[22] The *Manifesto*, Lenin's *State and Revolution* and *Left Wing Communism*, and Stalin's *Foundations of Leninism*, cited under its original title, *The Theory and Practice of Leninism*. Most of the excerpts relied upon by the prosecution here are quoted in the opinion, at 149-53.

[23] Cf. the remarks of Thomas Erskine in an early seditious libel case: "The greatest works upon government the most excellent books of science, the sacred Scriptures themselves, might be distorted into libels, by forsaking the general context and hanging a meaning upon selected parts." *Rex* v. *Stockdale*, 22 How. St. Tr. 257.

leaders is not party gospel. And we would deny our experience as men if we did not recognize that official party programs are unfortunately often opportunistic devices as much honored in the breach as in the observance."

As the evidence shows, Communists agree with the Court's strictures against a dogmatic reading of political writings or their mechanical application to situations outside of the historical context in which they were written. Even the prosecution's "expert", Lautner, testified that the Communist Party taught that the practical application of the principles of Marxism-Leninism is always dependent upon the conditions existing at the time and place in question and hence that no passage from the literature is applicable to all situations (R. 277-79). *The Communist Manifesto* and the *History of the Communist Party of the Soviet Union* reiterate and amplify the same warning (see *supra*, pp. 16-17).

The petitioner shares this view of Marxism-Leninism. "It enables us to perceive the direction in which things are heading", he wrote. "It does not, nor can it determine, for us beforehand, the form nor the exact time of a new social development" (R. 475).[24]

Accordingly, even if the writings of Marx and Engels in 1848 and those of Lenin and Stalin in the first quarter of this century clearly and unequivocally advocated violent overthrow as the prerequisite for the establishment of socialism under then prevailing conditions, the imputation

[24] For a recent illustration of the evolutionary character of Marxist thought, see the statements of N. Krushchev, in his report to the 20th Congress of the Communist Party of the Soviet Union concerning the non-inevitability of war and the possibility of achieving the transition to socialism by parliamentary means (New York Times, February 15, 1956). As the evidence here establishes, the American Communist Party anticipated Krushchev in advancing the latter proposition, and applied it specifically to the United States (D. Ex. 3; R. 476-79).

of such advocacy to the Communist Party and knowledge of it to the petitioner during the indictment period would still be wholly unwarranted. In fact, however, the "classical" writings are susceptible of an innocent interpretation. As the Court in *Schneiderman* concluded (at 157) after a review of the excerpts relied upon below and others of a more inflammatory nature:

> "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open."

The Court, of course, did not have before it the Lautner testimony, the current constitution of the organization and *Foster's History*, all of which, as we have shown, affirmatively establish that the Communist Party advocated a peaceful path to socialism in this country. But if this evidence were ignored, the most that could be said of the Communist Party's use of the "classical" literature and its adherence to Marxism-Leninism would be that they are susceptible of two interpretations, the one innocent and the other reprehensible. Under these circumstances, as *Schneiderman* held (at 158-59) the courts are not justified in "imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation." The court below cited no such overt acts by the petitioner, and there were none.

Finally, a reversal would be required even if the evidence could somehow be taken to establish that the Communist Party's acknowledged adherence to Marxism-

Leninism committed it, to the knowledge of petitioner, to the achievement of its ultimate revolutionary goal by violent means. For proof of an essential element of the offense would still be lacking. As the trial court instructed the jury (R. 581-82), the Smith Act does not denounce advocacy designed to induce discussion of or belief in the violent overthrow of the government but is confined to advocacy calculated to incite persons to violence. See *Dennis* v. *United States*, 341 U. S. 494, 502, 511-12.

Accordingly, it would not have been sufficient had the prosecution proved that, to petitioner's knowledge, the Communist Party advocated the necessity for violent revolution as a matter of political theory. What was required was proof that petitioner knew the Communist Party to have been engaged in incitements to violence. Yet there is not a scintilla of evidence which bears on this element of the offense. Petitioner does not dispute that, to his knowledge, the Communist Party recommended the study and discussion of the writings of Marx, Engels, Lenin and Stalin. But study and discussion of these political tracts, written by foreign Communists in bygone times, however their teaching may be interpreted, is a far cry from current incitements to the violent overthrow of our government "as speedily as circumstances will permit".[25] The court below made no attempt to bridge this gap, but simply ignored the fact that incitement is an element of the offense.

B. Intent

The indictment charges (R. 3) that the petitioner had the specific intent "to bring about such overthrow [of the government of the United States] by force and violence as

[25] An "incitement" to take action at some vague and presently unascertainable future date would itself appear to be a contradiction in terms, since the essential element of incitement is the immediate link between the words used and the action which they are designed to instigate.

speedily as circumstances would permit." Accordingly, the prosecution was required to establish that petitioner's membership in the Communist Party was not only accompanied by knowledge of its alleged teaching and advocacy, but also by his deliberate and specific purpose to bring about the evil apprehended by Congress. Cf. *Hartzell* v. *United States*, 322 U. S. 680, 686.

Each of the two elements of the crime charged stands on its own footing. Proof of the former does not establish the latter. Membership in an organization with knowledge that it has an illicit purpose does not establish that the member intended to effectuate that purpose. As the Supreme Court held in *Schneiderman* v. *United States*, *supra*, at 136:

> "* * * * under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms and asserted principles."

To the same effect, see *Knauer* v. *United States*, 328 U. S. 654, 669; *Baumgartner* v. *United States*, 322 U. S. 665; *United States* v. *Hauck*, 155 F. 2d 141, 144.

Accordingly, the specific intent charged in the indictment could not be imputed to a member of the Communist Party from the fact—if established—that he had knowledge that the organization taught and advocated proscribed doctrine. Intent must be proved by further evidence which establishes that the member joined the organization for the purpose of effectuating the forbidden objective.

The reasons for this requirement are particularly compelling in the circumstances of this case where the alleged seditious purpose of the organization is said to be couched as an ultimate goal to be achieved at some unascertained time in the remote future, while its day-to-day policies and activities are responsive to legitimate and pressing popular demands for reform. It would be blindness to deny that

individuals may be attracted to and join such an organization because of its immediate program although they do not share its belief in the need for an ultimate revolutionary solution of their social and economic problems.

Petitioner's intent could, of course, be proved only by his own acts and declarations. There was no such proof here. We have already reviewed every item of evidence touching his conduct. His speeches, teaching, conversations and writings over a twenty-year period are devoid of advocacy of violence for any purpose, much less for the purpose of overthrowing the government. True, he has been highly critical of many aspects of the foreign and domestic policies of the national administration, has expressed his admiration of the Soviet Union, and has stated his belief in the ultimate establishment of socialism in the United States. However unpopular or even repugnant some of his views may be in present day America and however intemperate this Court may consider some of his remarks, they do not so much as suggest an intention to resort to violence. Cf. *Hartzell* v. *United States*, *supra*, at 687 in which the Court reversed a conviction for lack of proof of the requisite specific intent on evidence far more cogent than anything in the present record.

The court below nevertheless held that guilty intent had been proved. It relied primarily on the same factors which it found established guilty knowledge: petitioner's many years of active membership in and devotion to the Communist Party, and his familiarity with its supposedly severe inner-party discipline (R. 625-26). Exactly the same factors were rejected by the Court in *Schneiderman* (at 147) as proof that a Communist Party member believed in political violence. The only additional matter relied on by the court below was a sentence, taken out of context, from the statement attributed to petitioner by Brzek (R. 626). As we have seen, however, that statement—if made—was entirely consistent with innocence (*supra*, pp. 33-34).

This case presents, in its most exaggerated form, the question whether Communist defendants in Smith Act prosecutions are to enjoy the benefit of accepted and constitutionally protected standards governing proof of guilt. Whatever the personal views of jurors and judges concerning the purposes of the Communist Party and its members and whatever the findings of courts in other Smith Act cases on different records, the petitioner was entitled to be adjudged solely on the record in *this* case. That record is devoid of evidence of guilty knowledge or intent. Moreover, it establishes by uncontradicted evidence which is conclusive for the purpose of this proceeding that the Communist Party advocated a peaceful path to socialism in the United States. It therefore affirmatively demonstrates that petitioner is innocent. The court below sustained the conviction only by ignoring the evidence exonerating the petitioner, and disregarding the presumption of innocence, the principle that guilt is personal, the constitutional protection accorded association and expression [26] and the provision of section 4(f) of the Internal Security Act that the holding of office or membership in a Communist organization shall not *per se* constitute a violation of any criminal statute.[27]

The conviction should therefore be reversed with directions to enter a judgment of acquittal.

II. The membership clause of the Smith Act is unconstitutional on its face and as applied by the Court below.

This case and *Scales* v. *United States, supra*, present for the first time the question of the constitutionality of the

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[26] We later show (*infra*, p. 56) that in addition to all of its other deficiencies, the evidence wholly fails to satisfy the clear and present danger test.

[27] We later argue (*infra*, p. 76) that section 4(f) not only requires a reversal of the conviction but was a bar to the indictment.

membership clause of the Smith Act. It is therefore necessary, at the outset, to note the differences between that clause and the provisions of the Smith Act which were involved in *Dennis* v. *United States, supra.*

The advocacy and organizing provisions of the Act, sustained in *Dennis*, prohibit the teaching or advocacy of the violent overthrow of the government and the organization of a society of persons who so teach and advocate. They punish individuals for their own acts or advocacy. The membership clause, on the other hand, does not penalize the accused for his advocacy but because of the advocacy of other members of the organization to which he belongs. It does not require proof that the accused participated in or helped to promote the proscribed advocacy or engaged in any overt act beyond that of joining the organization. He may be found guilty although he is a passive member who attends no meetings and engages in no advocacy or organizational activity of any kind. Proof of his membership and knowledge that other members advocate seditious doctrine are alone sufficient to convict him.

Thus it is not advocacy but association that the membership clause makes criminal.

The court below, failing to consider the differences between the provisions of the Smith Act involved here and in *Dennis*, holds that *Dennis* is decisive of the validity of the membership clause (R. 630-32). This is plainly not the case. On the contrary, under the rationale of the *Dennis* decision, the membership clause is unconstitutional on its face and as applied in this proceeding.

A. The Omission of Intent as an Element of the Offense

The membership clause contains no reference to the intent of an accused in becoming and remaining a member of the organization. Membership and knowledge that the proscribed doctrine is advocated by other members are the only elements of the offense. Construed in accordance with

its text, the statute authorizes the conviction of one who does not believe in violent revolution under any circumstances, but who joined the organization for some other and entirely legitimate purpose. So construed, the clause plainly violates due process as well as the First Amendment. *Dennis* v. *United States, supra, at* 515-16; *Adler* v. *Board of Education*, 342 U. S. 485, 494-96.[28]

The indictment seeks to remedy the defect in the text of the statute by charging petitioner with "intending to bring about such overthrow by force and violence as speedily as circumstances would permit" (R. 3). But the importation of a specific intent into the membership clause is wholly unwarranted. It is based on a fallacious application of the *Dennis* decision.

Dennis held that a specific intent to overthrow the government by violence was an unexpressed but necessarily implied element of the crimes defined in the advocacy and organizing provisions of the Smith Act. The Court gave the following reason for this conclusion (at 499):

> "The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who *advocate* and *organize* for the overthrow of the government. Certainly those who recruit and combine *for the purpose of advocating overthrow* intend to bring about overthrow." (Emphasis supplied.)

Thus the Court read a specific intent into the provisions of the statute then under consideration because of the obvious connection between advocacy of or organization for violent revolution and the intention to bring it about. Judge Hand

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[28] In the *Adler* case the Court sustained the New York Feinberg Law only because the statute did not make membership by a teacher in an organization which, to his knowledge, advocated violent revolution a conclusive disqualification to teach in the public schools, but afforded him a hearing in which he could rebut the inference of disqualification arising from such membership and knowledge.

put the same thought as follows (*United States* v. *Dennis*, 183 F. 2d 201, 214-15):

> "Obviously one cannot teach or advocate the use of violence without specifically intending to bring about its use; *a fortiori* must that be true if one organizes a group so to teach. * * * the sections carry their own specific intent."

The nexus between act and intent which was the foundation for the result in *Dennis* is wholly lacking here. It cannot rationally be said that because a person joins an organization knowing it to advocate violent overthrow, he must intend to effectuate that purpose. He may have joined for an entirely different purpose, e.g., to effectuate other and concededly legitimate policies of the organization, to reform it, or even to gather evidence for a Smith Act prosecution. As the Court said in the *Schneiderman* case, *supra*, at 136, "men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." It is for this reason, as we have seen, that the Court has refused to impute seditious intent to a member of an organization by virtue of his membership and knowledge that the organization has a seditious purpose. *Schneiderman* v. *United States*, *Knauer* v. *United States*, *Baumgartner* v. *United States*, all *supra*.[29]

Thus the reasoning which impelled the Court to read intent into the advocacy and organizing provisions of the statute is inapplicable to the membership clause. Moreover, the Smith Act itself appears to recognize the distinction between overt acts which can be said to carry their own specific intent and those which cannot. For while intent is omitted from the text of the advocacy and organizing provisions, it is included in the second paragraph of section

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[29] We have shown (*supra*, p. 42) that the reasons for rejecting such an inference are particularly compelling in the circumstances of this case.

2385 as an element of the offense of publishing or circulating literature that advocates violent overthrow. Plainly, Congress recognized that seditious intent cannot be inferred from the overt acts to which this provision is addressed. Further, the second paragraph of section 2385, while specifying intent, omits knowledge of the content of the literature as an element of the offense, apparently because Congress recognized that proof of intent carries with it an inference of such knowledge. The fact that the membership clause, in contrast, focuses on knowledge (from which intent cannot be inferred) to the exclusion of intent indicates that the omission of the latter was deliberate. In any event, as we have shown, there is no basis for reading an intent requirement into the clause, and without it the clause is unconstitutional.[30]

B. The Imputation of Guilt Solely by Reason of Association

Even if the membership clause could be said to import intent as an element of the offense, it would nevertheless be unconstitutional for imputing guilt from association, unaccompanied by any overt act of wrong-doing.

"Guilt with us remains individual and personal, even as respects conspiracies." *Kotteakos* v. *United States*, 328 U. S. 750, 772. See also, *Bridges* v. *Wixon*, 326 U. S. 135, 163; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 178-79.[31] As a number of distinguished com-

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[30] The court below and the court in the *Scales* case, *supra*, sustained the statute without discussing the omission of intent as an element of the offense.

[31] Cf. the statement of Charles Evans Hughes in opposing the expulsion of the Socialist members of the New York State Assembly in 1920: "* * * it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts; * * *." Quoted in *Schneiderman* v. *United States*, *supra*, at 154. The full text of the statement appears in Waldman, *Albany: The Crisis in Government* (1920), pp. 55-59.

mentators have noted, the membership clause represents the first Congressional attempt in the history of the nation to apply the "abhorrent" doctrine of guilt by association to citizens.[32]

The Court has twice invalidated state syndicalism laws under which the accused were convicted for membership in the Communist Party, unaccompanied by any illegal act or illicit advocacy on their part.

In *DeJonge* v. *Oregon*, 299 U. S. 353, the defendant was indicted and convicted under a state statute which made it a criminal offense to preside at or assist in conducting an assemblage of persons which teaches or advocates violence as a means of accomplishing industrial or political change.

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[32] "This idea that guilt is not necessarily personal, but can result from association, is absolutely abhorrent to every American tradition or conception of criminal justice before 1918. Unfortunately, in that hysterical period it got into our deportation statutes and state syndicalism acts; but the operation of both kinds of laws is not a cause for pride, and might well have deterred Congress from passing this part of section 2 [the membership clause]. It is the first time that guilt by association was ever introduced into a federal criminal law. Neither the Sedition Act of 1798 nor the Espionage Acts of 1917 and 1918 included such a conception. We got safely through the Civil War and the World War without finding it necessary to create group guilt outside the limits of an actual conspiracy." Chafee, *Free Speech in the United States* (1954), p. 470. For a detailed critique of the membership clause, see the same volume at 470-84. "Whatever its [the Smith Act's] merits otherwise, Congress had now for the first time made 'membership' or 'affiliation with' certain organizations a criminal offense. Abhorrent for generations and imported from the Immigration Act of 1918, 'guilt by association' became part of the law applicable to citizens". O'Brian, *New Encroachments on Freedom*, 66 Har. L. Rev. 1, 18. Guilt by association "appeared in our law only in 1940; since then it has grown and spread until this cloud, no larger than a man's hand, covers the whole horizon." Commager, *The Pragmatic Necessity for Freedom*, in *Civil Liberties Under Attack* (1951), p. 17. See also, Acheson, *A Democrat Looks at His Party* (1955), pp. 172-73; Biddle, *The Fear of Freedom* (1951), pp. 92, 105-06.

The facts, as found by the state court, were that the Communist Party advocated the violent overthrow of the government; that the defendant was a member of the organization, spoke in its name at a meeting held under its auspices, and urged those present to recruit members and to purchase Communist Party literature. There was no proof, however, that the defendant or the other speakers engaged in any advocacy of force or violence.

The Court reversed the conviction. It held that a person cannot constitutionally be convicted of crime for participation in a peaceable assembly under the auspices of the Communist Party, even if it is assumed that the organization advocates doctrines of force and violence. In reaching this conclusion the Court said (pp. 365-66):

> "We are not called upon to review the findings of the State Court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty."

In the *DeJonge* case, much more was shown as to the defendant's activities in relation to the Communist Party than is required under the membership clause of the Smith Act. DeJonge spoke at a meeting. He solicited membership. He urged the purchase of literature. Nevertheless, the Court held that the conviction violated the guarantees of the First Amendment (as incorporated into the Fourteenth) since it was secured without proof that the accused personally advocated proscribed doctrine or committed any other overt act of a criminal nature.

The Court emphasized (at 365) that the question under the Constitution is whether the defendant's "utterances

transcend the bounds of freedom of speech which the Constitution protects." The membership clause of the Smith Act, however, does not require proof of any utterances by the accused. Clearly the knowledge requirement of the Act and the intent alleged in the indictment (if the latter is an element of the offense) do not render the statute constitutional. For the *DeJonge* case was decided without reference to knowledge or intent, the Court holding flatly that a person cannot constitutionally be subjected to a criminal penalty because of his organizational association, if he has committed no criminal acts and has engaged in no advocacy that lies outside of the protection of the First Amendment.

In *Herndon* v. *Lowry*, 301 U. S. 242, the accused was convicted of an offense which the Court described as follows (at 260):

> "In its application, the offense made criminal is that of soliciting members for a political party and conducting meetings of a local unit of the party when one of the doctrines of the party, established by reference to a document not shown to have been exhibited to anyone by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government."

As in the *DeJonge* case, the defendant was not merely a passive member of the Communist Party, but an active, paid organizer who solicited membership. Moreover, he was shown to have knowledge of the organization's alleged seditious advocacy since he had in his possession a document issued by the organization which the Court found could be said to contain such advocacy.

Nevertheless, the Court held that the conviction violated the Constitution because the crime charged did not involve acts of incitement to insurrection or advocacy of violence on the part of the defendant. In reaching this conclusion, the Court said (at 261):

> "The only objectives appellant is proved to have urged are those having to do with unemployment and emergency relief which are void of criminality. His membership in the Communist Party and his solicitation of a few members wholly fail to establish an attempt to incite others to insurrection. * * * In these circumstances, to make membership in the Party and solicitation of members for that Party a criminal offense, punishable by death, in the discretion of a jury,[32a] is an unwarranted invasion of the right of freedom of speech."

The Court took occasion to restate the doctrine of the *DeJonge* and *Herndon* cases in *American Communications Association* v. *Douds,* 339 U. S. 382, in words which can leave little doubt as to the unconstitutionality of the membership clause. Although that decision sustained section 9(h) of the Taft-Hartley Law, it did so only on the premise that the non-Communist affidavits required of trade union officers did not substantially infringe the right of individuals to belong to the Communist Party and to participate in its peaceable advocacy.

Unlike section 9(h), the membership clause, in the words of the majority opinion in *Douds* (at 402), *is* "frankly aimed at the suppression of dangerous ideas." It *does* "restrain the activities of the Communist Party as a political organization" and "attempts to stifle beliefs" (at 404). It *does* proceed against "the groups or beliefs identified therein" rather than against "the combination of those affiliations and beliefs with occupancy of a position of great power" (at 403-04). It does *not* touch "only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint" (at 404). On the contrary, it pun-

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[32a] While the membership clause does not go this far, conviction under it now entails forfeiture of citizenship together with a possible twenty year sentence and deprivation of social security benefits. See ftn. 3, *supra.*

ished every person of "the identified affiliations and beliefs." The restraint imposed is not merely a "possible loss of position" in trade unions (*ibid.*), but a prison sentence of up to ten years. In the words of Mr. Justice Jackson's opinion (at 434), the membership clause *does* "suppress or outlaw the Communist Party" and prohibits "its members from engaging in any above-board political activity normal in party struggles under our political system." And it *does* prohibit an individual from being or becoming "a full-fledged member of the Party."

Thus, the opinions in *Douds* plainly foreshadow the invalidity of the membership clause. For the latter contains all of the vices which, if present in 9(h), would have rendered that section unconstitutional.

The opinion below ignores the foregoing decisions. It states (R. 629):

> "Had the defendant confined his advocacy and teaching for a change in our form of government within the limits of constitutional processes, he would clearly have been protected by the First Amendment."

Thus the court decided the case as though it had arisen under the advocacy provisions of the Smith Act, disregarding the fact that the offense defined in the membership clause does not involve advocacy by the accused but rests solely on association.[33]

The court below also expressed agreement with the opinion in the *Scales* case, supra, sustaining the constitutionality of the membership clause. The Court in *Scales*, like the court below, failed to consider *DeJonge*, *Herndon* and *Douds*. Instead, it avoided the impact of these cases by rewriting the membership clause. The *Scales* decision converts the statute into one that punishes conspiracies to overthrow the

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[33] Moreover, as we have shown (*supra*, p. 32) there was no evidence that petitioner had ever advocated violence.

government (227 F. 2d 581, 586, 588). By eliminating advocacy from the statute, the court dispensed with the embarrassing necessity of considering the effect of the First Amendment. By importing conspiracy into the statute, the court was able to by-pass the problem of guilt by association and to equate the case with the conspiracy considered in *Dennis*. Plainly, there is no warrant in the membership clause for either of these steps. Petitioner was not charged with conspiracy but with the substantive offense of membership. The gravamen of the indictment is not an agreement to overthrow the government but association with others who *advocate* overthrow.[34] Moreover, a reversal would be necessary even if the membership clause were susceptible of the interpretation which the court gave it. For if the court is right, petitioner was convicted of a crime with which he was not charged, for which he was not tried, and which was not proved against him. *Cole* v. *Arkansas*, 333 U. S. 196.

C. The Absence of a Clear and Present Danger

On its face and as applied below, the membership clause fails to satisfy the clear and present danger test as formulated and employed in *Dennis* v. *United States, supra.*

1. Face Invalidity.

The *Dennis* case marks the outermost limit of the Court's sanction of an abridgement of rights within the area guarded by the First Amendment. The Court there held that a conspiracy on the part of the leaders of the Communist Party to violate the advocacy and organizing provisions of the Smith Act, when engaged in in the context of the tense international situation existing at the date of the indictment, gave rise to a clear and present danger of

[34] Under the *Scales* decision, the membership clause simply duplicates 18 U. S. C. 2384 which punishes conspiracies to overthrow the government.

the violent overthrow of the government, the "substantive evil" that the Act was designed to prevent.

The conduct involved in *Dennis* was of an entirely different order from that prohibited by the membership clause. The defendants in that case were convicted of conspiring (1) to organize as the Communist Party a society of persons who teach and advocate the violent overthrow of government and (2) knowingly and wilfully to advocate such violent overthrow. The Court found (p. 511) that this conspiracy was "highly organized * * * with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action." The Court emphasized (*ibid.*) "It is the existence of the conspiracy which creates the danger." [35]

The membership clause presents an entirely different situation. It does not involve the element of conspiracy, so that the factor which the Court held "creates the danger" is utterly lacking. It does not require proof that the accused was a leading member of the organization or that he engaged or planned to engage in any advocacy or organizational activity whatsoever. Indeed, the clause would be superfluous if it applied only to members who advocated the proscribed doctrine or were active in organizing persons to engage in such advocacy. For conduct of this character is prohibited by the advocacy and organizing provisions of the Act. Thus the thrust of the clause is against members who are completely passive or whose activity is confined to legitimate advocacy.

But the membership of individuals whose activity is so confined cannot constitute a danger to the government of the United States under any circumstances. The fact that the accused has knowledge that other members engage in

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[35] Mr. Justice Jackson's concurring opinion (at 570) rested entirely on the fact that the indictment was for conspiracy. And Mr. Justice Frankfurter (at 542) gave heavy emphasis to the conspiracy factor.

proscribed advocacy or that he intends to bring about the violent overthrow of the government (if such intent can be imported into the statute) in no wise increases the "danger" in the absence of any overt conduct beyond the bare act of association.

The Court emphasized in *Dennis* (at 516) that under the advocacy and organizing provisions of the Smith Act:

> "When there is doubt as to the *intent of the defendants, the nature of their activities or their power to bring about the evil,* this Court will review the convictions with the scrupulous care demanded by Constitution." (Emphasis supplied.)

The membership clause, however, authorizes the conviction of an accused who engages in no "activity" whatsoever and who is powerless "to bring about the evil." Moreover, as we have shown, it does not even require proof of seditious intent on the part of the accused. Thus, none of the constitutional requisites for a conviction under the advocacy and organizing provisions of the Smith Act is an element of the offense created by the membership clause. Accordingly, under the standards laid down in *Dennis,* that clause is unconstitutional on its face.

2. Application.

Even if it were to be held that the membership clause does not contravene the clear and present danger requirement on its face, the application of the statute in this case was unconstitutional.

A finding that a clear and present danger exists under the facts of a particular case involves consideration of two factors: (1) the nature of the defendant's activities, and (2) the circumstances under which these activities were engaged in. As applied to a Smith Act case by the majority in *Dennis,* the issue is whether the conduct of the defendant as established by the evidence, in the light of the interna-

tional situation existing at the time of the indictment, gave rise to a clear and present danger of the violent overthrow of the government. Thus the Court held (at 511) that it was the combination of what it characterized as the "highly organized conspiracy" formed by the defendants "coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with other countries with whom petitioners were in the very least ideologically attuned" that created the danger.

In the present case, the evidence as to the petitioner's activities during the three year statutory period preceding the indictment, and the state of our foreign relations at the time the indictment was returned, establish that the finding below as to the existence of a clear and present danger was palpably erroneous.[36]

The evidence as to petitioner's activities during the three years preceding the return of the indictment showed that he had been a member and officer of the Communist Party, had spoken at three meetings and had written two articles for the *Party Forum*, a publication of the Communist Party of Illinois (Appendix B, *infra* pp. 97-98; G. Ex. 59, 66, R. 379-80). As we have seen (*supra*, p. 32) these speeches and articles contained nothing but legitimate political advocacy. Under no circumstances could they be even remotely "dangerous."[37] Thus, there is no evidence of conduct by petitioner of the character relied on in the *Dennis* case.

Moreover, as we have seen, the Court did not hold that the conduct of the *Dennis* defendants would give rise to a

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[36] The finding of the trial judge on this issue was implicit in his submission of the case to the jury and was affirmed by the court below (R. 631-32).

[37] As the record establishes, the petitioner's activities prior to the three years preceding the indictment were similarly devoid of "danger".

clear and present danger under all circumstances. It held only that their conduct created such a danger when engaged in the context of "the inflammable nature of world conditions" found to have existed at the time of the indictment. The Court of Appeals in *United States* v. *Dennis*, 183 F. 2d 201, 213, stated the issue as follows:

> "We need not say that even so thoroughly planned and so extensive a confederation would be a 'present danger' at all times and in all circumstances; the question is how imminent: that is how probable of execution—it was in the summer of 1948, when the indictment was found."

After posing this question, the court found that in the summer of 1948 (*ibid.*):

> "Any border fray, any diplomatic incident, any difference in the construction of the *modus vivendi*—such as the Berlin blockade we have just mentioned—might prove a tinder box, and lead to war." [38]

The international setting in May 1954, the date of the indictment in this case, was materially different from that of 1948-1951 on the basis of which the *Dennis* conviction was affirmed.

The Korean truce took effect in July 1953. By 1954, a marked relaxation of international tensions had occurred, leading to the Geneva conference in the spring of that year

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[38] In *United States* v. *Flynn*, 216 F. 2d 354, 367, the court held that the danger found in the *Dennis* case had not abated by the summer of 1951, the date of the *Flynn* indictment, "when the Korean conflict was raging and our relations with the Communist world had moved from cold to hot war." The indictments in *United States* v. *Mesarosh*, and *Yates* v. *United States*, *supra*, were likewise returned during the period of the Korean war. It is significant in this connection that the evidence as to the petitioner's activities during the Korean war shows that his primary concern was with the advocacy of a cease-fire (G. Exs. 59, 66).

and the establishment of peace in Indo-China. In October, 1954, the President stated (*N. Y. Times*, October 21, 1954):

> "For the first time in twenty years, there has been for some months no active battlefield anywhere in the world. Moreover, while fighting has been brought to a halt during the past twenty-one months, still other developments favorable to the maintenance of peace have been brought about through understanding and through persistent and patient work, in which your government has been a helpful participant."

In his State of the Union Message on January 5, 1955, five days before the trial of this case began, the President was able to report (*N. Y. Times*, Jan. 6, 1955):

> "There has been progress justifying hope for continuing peace and for the ultimate rule of freedom and justice."

The progress to which the President referred made possible the "summit" conference at Geneva, accompanied by the further relaxation of tensions and recession of the danger of war. Thus, the background factors whose presence *Dennis* held essential to the constitutional application of the advocacy and organizing provisions of the Act were no longer in existence at the time the indictment here was returned. Cf. *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543.

The majority in *Dennis* (at 510) weighed "the gravity of the 'evil' discounted by its improbability" against the values inherent in the guarantees of the First Amendment. It held that the threat to the nation from the conduct of the defendants at a time when war seemed imminent tipped the balance in favor of security as against individual liberty.

The present case requires a different weighting. On the one hand, the danger of the effectuation of the "evil"

from the activities of the petitioner, as disclosed by the evidence, is so remote as to be altogether improbable under any circumstances, and particularly so in the setting of the new and improved international situation since 1954. On the other hand, greater weight must be given to the preservation of our democratic freedoms, now that the conflict between the capitalist and socialist worlds has moved to a new plane where the issue will be decided, not by arms, but by superiority of social, political and economic institutions and practices. Indeed, the First Amendment has become one of our most potent weapons in what the Chief Justice called "a contest for the hearts and minds of men." [39]

We believe that the reformulation of the clear and present danger test by the *Dennis* majority comes perilously close to substituting a rule of expediency for the command of the First Amendment. But even under that reformulation, there can be no doubt that the new balance which must be struck in this case requires a reversal of the conviction.[40]

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[39] Address to the American Bar Association, 40 A.B.A. Jour. 955.

[40] The court below, disregarding the facts which distinguish this case from *Dennis*, relied on the latter as authority for the conclusion that the membership clause, on its face and as applied, satisfies the clear and present danger test (R. 631-32). The opinion in *Scales, supra* (at 588), as we have seen, holds that the membership clause does not involve conduct protected by the First Amendment and hence that the clear and present danger test is inapplicable.

III. It was reversible error to deny petitioner's motion that the trial judge inspect the contemporaneous report made to the F.B.I. by the witness, Brzek, concerning the subject matter of his testimony, for the purpose of determining whether the report contradicted the testimony and should therefore be made available to the defense.

As we have seen, Brzek testified that in 1947, while acting as an informer for the F.B.I., he attended a class taught by the petitioner at a Communist school in Ivanhoe, Wisconsin. He further testified that the petitioner gave a lecture studded with references to "bloodshed" and ending with the statement that, "If we have to shed blood we will" (R. 460-62; supra, p. 10). On cross-examination, Brzek stated that he had made a written report to the F.B.I. on the contents of this class room lecture (R. 467-68).

The petitioner moved for the production of the witness' F.B.I. report for inspection by the trial judge so that he could ascertain whether it contradicted the testimony and should therefore be made available to the defense (R. 468, 472). The prosecution did not deny the existence of the report or its availability, stating only that it had been made to the Milwaukee office of the F.B.I. and was not in the court room (R. 469). Nor did the prosecution urge that the contents of the report were confidential or privileged. Nevertheless, the Court denied petitioner's motion, and its ruling was affirmed by the court below (R. 472, 628-29).[41] This action was plainly erroneous and requires a reversal.

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[41] The trial court had previously granted a similar motion with reference to the F.B.I. reports of the witness Czarnowski. It ruled, after inspecting them, that they did not contradict the testimony of the witness and hence should not be made available to the defense (R. 424-26, 469-70).

We have shown (p. 33) that an analysis of Brzek's testimonial version of the petitioner's remarks discloses that they contained no advocacy of violence, much less of the violent overthrow of the United States Government. Nevertheless, the testimony was highly prejudicial. The repeated and inflammatory references to bloodshed undoubtedly affected the jury and may well have tipped the beam against the petitioner, particularly because the Brzek testimony was the only direct evidence in the entire record that petitioner had ever contemplated a resort to violence for any purpose or under any circumstances. Moreover, the prosecution leaned heavily on this testimony in its summation [42] and the court below relied upon it in holding that the evidence sustained the verdict (R. 626).

It is clear that if Brzek's F.B.I. report in fact contradicted his testimony, the petitioner was entitled to inspect it, use it in cross-examination, and introduce it in evidence. *Gordon* v. *United States*, 344 U. S. 414, 417. A claim by the prosecution that the contents of the report were privileged, if it had been asserted, would have been unavailing, at least as to so much of the report as dealt with the subject of the witness' testimony. *United States* v. *Krulewitch*, 145 F. 2d 76, 78-79; *United States* v. *Grayson*, 166 F. 2d 863, 870. Cf. *Edwards* v. *United States*, 312 U. S. 473, 480-82; *United States* v. *Reynolds*, 345 U. S. 1, 12.

Obviously, Brzek's F.B.I. report itself contained the best, if not the only available evidence as to whether its contents contradicted the testimony of the witness. At a minimum, therefore, the petitioner was entitled to an inspection of the report by the trial court so that the latter might determine whether it tended to discredit the witness and hence was material to the defense. *United*

[42] At pp. 1357-58, 1365-66, 1455-59 and 1491 of the typewritten transcript of the record filed with the court below.

States v. *Le Bron* (C. A. 2), 222 F. 2d 531, 537; *United States* v. *Krulewitch* (C. A. 2), 145 F. 2d 76, 78; *United States* v. *De Normand* (C. A. 2), 149 F. 2d 622, 625; *United States* v. *Simonds* (C. A. 2), 148 F. 2d 177, 179; *Boehm* v. *United States* (C. A. 8), 123 F. 2d 791, 807-808; *Crosby* v. *Pacific S. S. Lines* (C. A. 9), 133 F. 2d 470, 475; *United States* v. *Schneiderman* (D. C. S. D. Calif.), 106 F. Supp. 731.[43] The procedure approved in these cases was followed in the *Scales* case, as appears from the opinion (227 F. 2d 581, 592). It has also been followed in the Fifth Circuit. See *Shelton* v. *United States*, 205 F. 2d 806, 814.[44]

Had the trial court, after inspecting the report, held that it was not material to the defense or admissible in evidence, the petitioner could have requested that it be sealed and certified as a part of the record so that the ruling below might be reviewed on appeal. See the *Krulewitch*, *De Normand* and *Simonds* cases cited above.

The error in refusing to inspect Brzek's report was magnified by the fact that a number of circumstances made the witness' testimony suspect. There is internal evidence of its fabrication, such as the statement that the petitioner said, "The bloodshed end, the bloodshed, it wouldn't be by, say, shooting firearms, to be a more quiet method" (R. 461).[45] Further, while Brzek purported to have a complete and accurate recollection of remarks made by petitioner eight years before the trial, his memory of other lectures given at the school and the identity of other teachers was

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[43] The latter case is now before this Court for review of other questions *sub. nom. Yates* v. *United States*, *supra*. The decision in the *Schneiderman* case was cited with approval by the trial court in *United States* v. *Mesarosh*, 116 F. Supp. 345, 350.

[44] As we have seen (ftn. 41, *supra*), the trial judge himself followed this procedure in the case of the F.B.I. reports of the witness, Czarnowski.

[45] The court below commented on the high level of petitioner's intelligence (R. 620).

hazy or non-existent (R. 465-67). Finally, a prosecution witness, Miss Skinner, who attended the Ivanhoe school with Brzek (R. 450), preceded him to the stand. The prosecution, however, carefully refrained from questioning her about petitioner's lectures, but merely had her identify a typewritten schedule of the school classes (R. 450-51) which it later used to "refresh" Brzek's memory and to give his testimony a facade of verisimilitude (R. 456-58).

The court below treated petitioner's motion as though it had asked for the immediate submission of the Brzek report to him, and not for its inspection by the trial judge. Erroneously stating that petitioner relied principally on the decision in *Gordon* v. *United States, supra,* the court affirmed the ruling of the trial judge on the ground that petitioner had failed to establish a contradiction between the testimony and the report (R. 628). It did so without mentioning the decision on trial court inspection of reports, referred to above, which petitioner cited and relied upon in his briefs below.[46]

The opinion below also suggests that petitioner's motion was untimely, stating that it was not made until after the prosecution had closed its case (R. 628). The statement is erroneous, for the record shows that the motion was made at the conclusion of the testimony of the witness and before the prosecution rested (R. 468, 472).

The Solicitor General's opposition to the petition for certiorari (pp. 21-22) advances another version of the

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[46] The court cited *Jencks* v. *United States,* 226 F. 2d 540 (cert. granted, No. 23, this term) which, in accord with the decision below, seems to have placed a motion for trial court inspection of F.B.I. reports on the same footing as a motion for their immediate production to the defendant. But cf. *Fisher* v. *United States,* 231 F. 2d 99, holding that the defense was entitled to the production to it of receipts of an informer witness for monies received from the F.B.I. without a showing that the receipts contradicted the testimony of the witness and notwithstanding that, at most, they would impeach him on a collateral issue.

untimeliness argument, urging that the motion came too late because it was not made until the witness stepped down from the stand. It is not and could not be asserted that the prosecution was prejudiced in any way because the motion was delayed until immediately after the witness was excused. The suggestion seems to be, however, that this fact would have foreclosed petitioner from making use of the report if the trial judge had made it available to him. The suggestion is groundless. Petitioner could have recalled the witness for further cross-examination. *Belanger* v. *Alton Box Board Co.*, 180 F. 2d 87, 94; *Ching* v. *United States*, 264 F. 639, 642, cert. den. 254 U. S. 630.[47] In the alternative, petitioner could obviously have offered the report as part of his affirmative case.

The decision below is not only contrary to the great weight of authority in other circuits but violates a principle that is fundamental to the administration of justice. As Judge Cooley states in *People* v. *Davis*, 56 Mich. 569, 573-4:

> "* * * the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of unworthy persons. But surely the state has no such interest; its interest is that the accused parties shall be acquitted unless upon all the facts they are seen to be guilty; and if there be in the possession of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it."

Observance of the principle stated by Judge Cooley is of special importance in the case of the testimony of pro-

[47] This was the procedure contemplated by the trial judge in the case of the F.B.I. reports of the witness, Czarnowski. The judge reserved decision on petitioner's motion for their production with the understanding that the witness would be subject to recall if the reports were thereafter made available to the defense (R. 424-26).

fessional informers. The reckless use of these informers by the Department of Justice in "security" cases has aroused widespread apprehension and alarm, particularly in the light of current revelations of the untrustworthiness of such testimony.[48] Only recently the Court had occasion to state the standard to be applied in passing upon a challenge to the veracity of informer witnesses:

> "'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. * * * Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be so manifest that only irrational or perverse claims of its disregard can be asserted.'"
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> *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124.

The ruling below falls far short of meeting this standard. Court inspection of the relevant reports of F.B.I. informers is the minimum precaution required to assure defendants a fair trial and to guard the administration of justice against the use of tainted testimony. The denial of this safeguard by the court below requires a reversal.

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[48] See, *e.g.*, Rovere, *The Informer, Harpers Magazine*, May 1955; Biddle, *Subversives in Government*, Annals of American Academy of Political Science, July 1955; Matusow, *False Witness* (1955); opinion of Dimock, J., granting new trials in *United States* v. *Flynn*, 130 F. Supp. 412.

IV. The Erroneous admission of prosecution evidence requires a reversal.

A. The Lautner Testimony

Lautner's role as a prosecution witness was confined to that of an "expert" who gave his opinion concerning the meaning of the term "Marxism-Leninism" and the "final aim" of the Communist Party (R. 203-11). There was no evidence that the opinion of the witness on these matters was shared by or even known to the petitioner with whom he had never so much as exchanged a word.[49] Nor does it appear that the Communist Party or any of its members was in agreement with the views which Lautner expressed.

The admission of this opinion testimony was erroneous.

In the first place, it was irrelevant. The issues of fact for the jury were whether petitioner had the knowledge and intent charged in the indictment. Evidence that the Communist Party advocated proscribed doctrine would have no tendency to establish guilt if petitioner was unaware of such advocacy. The only relevant advocacy of the organization was advocacy shown to have been within the knowledge of the petitioner. Accordingly, Lautner's uncommunicated personal opinion concerning the aims of the Communist Party and the meaning of Marxism-Leninism was plainly irrelevant.

The Lautner testimony was also incompetent. It is elementary that the acts and declarations of third persons, neither authorized nor ratified by the defendant, are inadmissible hearsay. *A fortiori,* opinion testimony must be excluded which, at most, represents the witness' conclusions from the acts and declarations of unidentified third parties unconnected with the petitioner.

The prosecution, however, proceeded on the premise that because the first paragraph of the indictment alleged

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[49] Lautner's only contact with petitioner was on one occasion when he "checked him in" as a delegate to a convention (R. 170).

that the Communist Party is a society of persons who advocate the violent overthrow of the government, it was entitled to prove that allegation by evidence entirely unconnected with the petitioner, and was bound by the hearsay rule only when it offered evidence under the second paragraph of the indictment to establish that the petitioner had knowledge of the teaching and advocacy alleged in the first (R. 185). We believe it too plain for argument that the rule excluding third party acts and declarations not connected with the defendant, which is the procedural corollary of the principle that guilt is personal, cannot be circumvented by manipulating the form of an indictment.

Accordingly, if the first paragraph of the indictment should not be disregarded as surplusage, its allegation can be proved only by evidence which is admissible against a defendant in a criminal trial—i.e., by evidence of the defendant's own acts and declarations or those of others for which he is vicariously liable because he authorized or ratified them.

The court below dismissed our contention with the statement that the Lautner testimony was material (R. 627).

Several courts of appeals have held opinion testimony similar to Lautner's admissible in Smith Act conspiracy cases. E.g., *United States* v. *Dennis*, 183 F. 2d 201, 229. We believe this ruling erroneous. In any event it was based on conspiracy law and is therefore applicable. What the courts held was that since a statement by any of the co-conspirators as to his understanding of the meaning of "Marxism-Leninism" would be relevant to their mutual understanding of the term and competent against all of them, the conclusion of a witness, drawn from such statements, is likewise admissible. The following excerpt from the opinion in the *Dennis* case (at 229) makes it clear that this was the basis for the ruling:

> "He [the witness] was as well qualified as an expert to know what that meaning was as anyone

could be; and we cannot see any more reason to exclude his testimony *than to exclude the evidence of any other parts of the mutual understanding of the defendants.* As for the rule against conclusions, it is at most only one of convenience * * *." (Emphasis supplied.)[50]

The dangers inherent in the co-conspirator rule as conventionally applied[51] are multiplied when the rule is extended to admit the opinions or conclusions of a witness as to the mutual understanding of the conspirators. This is particularly true where the witness is permanently employed by the prosecution for the purpose of giving "expert" opinion that the defendants are guilty.

But whether or not the Lautner testimony would properly have been admissible in a conspiracy case, it should clearly have been excluded here. For the relevant issue was not the mutual understanding of the other members of the organization but that of the petitioner, as to which Lautner said nothing. Furthermore, the rule which makes the declaration of a conspirator or other partner in crime competent against his co-conspirators or co-partners is limited to cases in which the *indictment charges* a conspiracy or other form of concerted venture. The *Dennis* case itself states this limitation (at 230). And see also *McWhorter* v. *United States,* 281 F. 119, 121; *Sorenson* v. *United States,* 168 F. 785, 792; *Quercia* v. *United States,*

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[50] That the ruling was based on conspiracy principles is also apparent from the form of the question put to the witness. After reading to the witness the clause of the Communist Party constitution stating that the organization bases itself "upon the principles of scientific socialism, Marxism-Leninism", he was asked: "What did you *in connection with the other Communists that you were working with there* [at the convention that adopted the constitution] understand that to mean." See the record in *United States* v. *Dennis,* p. 3635. (Emphasis supplied.)

[51] See Mr. Justice Jackson's concurring opinion in *Krulewitch* v. *United States,* 336 U. S. 440, 445.

70 F. 2d 997, 999; *Barrett* v. *United States*, 33 F. 2d 115, 116.[52]

As Mr. Justice Jackson wrote in the *Krulewitch* case, *supra* (at 449):

> "However, even when appropriately invoked the looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case."

Plainly, conspiracy doctrine is not "appropriately invoked" in a case where no conspiracy is charged. Nor can the doctrine be extended "to meet the exigencies" of the instant case without abrogating the fundamental precept of Anglo-American jurisprudence that guilt is personal.

The erroneous admission of the Lautner testimony requires a reversal. True, as we have shown (*supra*, p. 35), Lautner not only failed to support the allegation of the indictment that the Communist Party advocates the proscribed doctrine, but his answers on cross-examination refuted that charge. Nevertheless, his testimony was prejudicial.

In the first place, Lautner laid the foundation for the admission of a number of excerpts from the writings of Lenin and Stalin, and the *History of the Communist Party*

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[52] The court in the *Scales* case, *supra* (at 591-92) held third party declarations admissible on the ground that the offense created by the membership clause is tantamount to a conspiracy and, hence, that the co-conspirator rule is applicable. This decision is not only contrary to the cases cited in the text but has the effect of denying to defendants in Smith Act membership cases the benefit of the limitation of the co-conspirator doctrine to situations where the jury has first found that a conspiracy was formed to which the accused and the declarant were parties and that the statements of the declarant were made in furtherance of the objects of the conspiracy. See *United States* v. *Dennis*, *supra*, at 230.

of the Soviet Union, which the prosecution then proceeded to read to the jury (*supra*, p. 16; R. 235-60). The damaging effect of these excerpts on which the case for conviction is staked was, of course, not repaired by the fact that the trial court limited the purpose of the admission of some of them to their bearing on the opinion testimony of the witness (R. 227-28).[53] In the words of Mr. Justice Jackson in the *Krulewitch* case (at 453), any such "naive assumption" would be an "unmitigated fiction."

Moreover, Lautner's use of such scare words as "the proletarian revolution" and "the dictatorship of the proletariat" (R. 206, 211) in stating his opinion as to the meaning of Marxism-Leninism and the objectives of the Communist Party, as well as the extended description of his activities in the Communist Party, given under the guise of qualifying him as an expert (R. 133-75), were highly prejudicial.

B. The Meyer Testimony

As we have seen (*supra*, p. 11), Meyer testified that, from 1934 to 1942, he had been closely associated with the petitioner in the Illinois Communist Party. However, except for confirming the admitted fact that petitioner had been a member and officer of the organization, the sole function of the Meyer testimony was to serve as a vehicle for the introduction in evidence of excerpts from the "classical" writings of Communism and the *History of the Communist Party of the Soviet Union*. These excerpts were offered and received on the basis of the witness' testimony that he had discussed them with the petitioner in connection with a revision of the teaching program in the Workers School (R. 96-108, 228-31). The witness said nothing concerning the content of the discussion, the peti-

[53] While Meyer testified that petitioner was familiar with some of the excerpts, there was no evidence that petitioner had ever read others (see, *supra*, p. 16).

tioner's interpretation of these writings, or his understanding of their application to conditions in the United States.

Meyer testified that the discussion of the books took place in "early 1940" (R. 96). The Smith Act did not become law until June 28, 1940 (18 U. S. C. 2385; Revisor's note), and the discussion in question therefore antedated the law.

The Meyer testimony would have been of doubtful admissibility even if it had established guilty knowledge or intent at the time the discussion occurred. See *Wolf* v. *United States* (C. A. 8), 259 F. 388; *Haywood* v. *United States* (C. A. 8), 268 F. 795, 806-07; *Langer* v. *United States* (C. A. 8), 76 F. 2d 817, 827, which hold that it cannot be presumed that a state of mind, innocent at the time it was shown to exist, will continue unchanged after the enactment of a law making it an element of an offense. *United States* v. *Dennis*, *supra* (at 231-32) and *United States* v. *Mesarosh*, *supra* (at 454) are to the contrary. We believe that the Eighth Circuit decisions state the better rule.[54]

In any event, the Meyer testimony is inadmissible for another reason. The discussions with petitioner not only antedated the Smith Act but took place fourteen or more years prior to the indictment. In the absence of any evidence as to the content of the conversations which occurred in this remote period, the bare fact that petitioner

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[54] Cf. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 705-06, a civil case, in which the Court said: "* * * testimony of prior and subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under inquiry. * * * *And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this* where the effect of the Commission's order is not to punish or fasten a liability on respondents for past conduct but to bar specified practices for the future * * *." (Emphasis supplied.)

was familiar with certain Marxist books and used them as classroom texts had, at best, only the slightest relevance to his knowledge and intent during the indictment period. Under these circumstances, the *Dennis* and *Mesarosh* decisions, even if correct, are inapplicable, as the court in the former case recognized. See *Kammann* v. *United States* (C. A. 7), 259 F. 192, 195, with which the *Dennis* opinion expressed agreement (at 231-232):

> "But if there was a prima facie case to go to the jury, it is apparent how damaging it would be to allow a close or doubtful case to be bolstered up with proof of expressions which are not fairly attributable to an intent or willingness to interfere with our military forces as proof of an intent to violate those commands of the Espionage Act when it should come to be enacted. That would virtually be giving an ex post facto effect to the statute itself."

The court below sustained the admission of Meyer's testimony in reliance on the *Dennis* and *Mesarosh* cases and without mention of its own decision in *Kammann* (R. 627).

The erroneous admission of the Meyer testimony requires a reversal. For it served as the foundation for the introduction in evidence of numerous highly prejudicial excerpts from the "classical" Marxist literature which, as we have seen, formed the heart of the case for the prosecution.

C. The "Classical" Literature

As we have seen, the only foundation for the introduction in evidence of the excerpts from the writings of Marx, Engels, Lenin and Stalin and from the *History of the Communist Party of the Soviet Union* was the testimony of Lautner and Meyer. If, as we have urged above, their testimony concerning these excerpts should have been excluded, it follows of course that the excerpts themselves were inadmissible.

The excerpts should have been excluded for an additional reason. The only evidence connecting petitioner with any of these exhibits was contained in the testimony of Meyer, who stated merely that the two men had discussed them and that petitioner had used them as class room texts. There was no evidence that the petitioner (or, for that matter, the Communist Party or any of its members) had ever understood or taught that the "classical" literature advocated the violent overthrow of the government of the United States. The record establishes only that petitioner and the Communist Party engaged in peaceable study, discussion and teaching of these writings. Such conduct is not and cannot be proscribed. *Dennis* v. *United States, supra* (at 501-02).

Nevertheless, the court below held that the excerpts were admissible, stating that they were probative of the current program and teachings of the Communist Party and the knowledge and intent of petitioner (R. 628). By this logic, Jefferson's recommendation that the tree of liberty be refreshed by the blood of patriots and tyrants [55] is probative of the charge that the Democratic Party currently advocates violent overthrow and that any Democrat who professes to be a Jeffersonian has guilty knowledge and seditious intent.

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[55] In a letter to William Smith hailing Shay's Rebellion. The court below seems to believe that we cited this statement as a justification for the advocacy of violence (R. 626).

V. It was error to instruct the jury that the teaching and advocacy alleged in the indictment has reference to the teaching and advocacy of the Communist Party as an entity and not to that of its members individually.

Both paragraphs of the indictment (R. 3), in conformity with the statute, refer to the Communist Party as "a society, group and assembly of *persons who* teach and advocate" the proscribed doctrine. Strictly construed, as they must be, the statute and the indictment plainly do not refer to the advocacy of the organization as an entity but to that of the "persons who" are its members. Obviously, if only the leaders or a small fraction of the members engaged in the proscribed advocacy, without authorization or ratification by the other members, the organization could not be a "society of persons" who so advocate. It follows that the indictment required proof that, to petitioner's knowledge, a majority, or at least a substantial proportion, of the members advocated illicit doctrine either personally or vicariously.

Petitioner's request for an instruction to this effect was denied (R. 520-21, 553-54, 616-18). Instead, the trial court instructed the jury (R. 577) that the teaching and advocacy alleged in the indictment refers to the teaching and advocacy of the organization and not to that of its members individually. The court below affirmed without discussion.

The ruling below was erroneous. Had Congress intended the test of guilt to be knowledge of the alleged advocacy of the organization as an entity, it could have said so in clear and unequivocal terms. Indeed, it has said so clearly and unequivocally in other legislation relating to the same general subject matter. Thus, the Immigration and Nationality Act provides for the exclusion or deportation, and prohibits the naturalization, of any alien "who is a member of or affiliated with *any organization that* advocates or teaches" the overthrow by force

or violence of the government of the United States. 8 U. S. C. 1182(a)(28)(F), 1251(a)(6)(F), 1424(a)(4) (emphasis supplied). Similarly, the Labor Management Relations Act makes provision for an affidavit from each officer of a labor organization that he "is not a member of or supports any *organization that* believes in or teaches the overthrow of the United States Government by force." 29 U. S. C. 159(h) (emphasis supplied).

It cannot be argued that the distinction between the two formulations is without a difference. An unincorporated association is an entity distinct from its membership. Acts or advocacy of the former cannot be imputed to the latter in the absence of authorization or ratification. *United States* v. *White*, 322 U. S. 694, 703. Cf. *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U. S. 295; *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344.

Had the trial court granted petitioner's requested instruction, there could not have been a conviction. For the prosecution tried the case on the theory of the instruction which was given and offered no evidence that, to the knowledge of the petitioner or otherwise, individual members of the Communist Party engaged in, authorized or ratified the proscribed advocacy.

VI. Prosecution of the offense charged in the indictment is barred by section 4(f) of the Internal Security Act.

Section 4(f) of the Internal Security Act (50 U. S. C., 783(f)) provides that, "Neither the holding of office nor membership in any Communist organization by any person shall constiute *per se* a violation of subsection (a) or subsection (c) of this section *or of any other criminal statute*" (emphasis supplied).

The gravamen of the indictment is that membership in a Communist organization (the Communist Party) with

knowledge of the alleged illicit advocacy of the organization or its members *does* constitute a violation of a criminal statute—*i.e.*, the membership clause of the Smith Act. Accordingly, section 4(f) bars the prosecution of the offense charged in the indictment unless membership in the Communist Party, when accompanied by knowledge of the alleged illicit advocacy, is something more than membership "per se," and is therefore not included within the immunity which section 4(f) confers.

An examination of the language and legislative history of section 4(f) demonstrates that the purpose, intent and effect of the section was to bar the prosecution of offenses based on membership in the Communist Party unaccompanied by any other *overt act*, and specifically to bar the prosecution of Communists under the membership clause of the Smith Act.

It is obvious from the face of section 4(f) that Congress was of the opinion that membership *per se* did constitute a violation of some criminal statute other than the Internal Security Act. Otherwise, there would have been no point in the reference to "any other criminal statute." At the time the Internal Security Act was enacted, there was no statute in existence making membership in the Communist Party criminal when not accompanied by knowledge of the alleged seditious character of its advocacy or that of its members. The only criminal statute on the books which might have been applicable to members of the Communist Party by virtue of their membership was that portion of the Smith Act under which the indictment is laid.

It is plain therefore that the reference in section 4(f) to "any other criminal statute" is meaningful only if it refers to the membership clause of the Smith Act. But, under that clause, membership in the Communist Party is not a crime unless the member has knowledge of the alleged seditious advocacy of the organization or its members. Accordingly the term membership "per se" as used in

section 4(f) of the Internal Security Act must have been intended by Congress to embrace membership with knowledge of such seditious advocacy. A contrary construction of section 4(f) would require treatment of the reference to "any other criminal statute" as surplusage and violate the familiar principle that, if possible, effect be given to all of the words of an enactment. *McDonald* v. *Thompson*, 305 U. S. 263, 266.

This is not to say that Congress intended section 4(f) to repeal the membership clause of the Smith Act. What it did clearly intend, however, was to make that clause unavailable for the prosecution of members of the Communist Party.

This reading of section 4(f) is confirmed by its legislative history.

The Internal Security Act provides machinery for the compulsory registration of "Communist-action" organizations. It provides that in the event of the failure of an organization to register when ordered to do so, and to list the names of all of its members, the individual members must register themselves (sections 7 and 8; 50 U. S. C. 786, 787). The statute further provides onerous criminal penalties for the failure of the organization's officers and members to comply with these requirements (section 15; 50 U. S. C. 794). See, *Communist Party* v. *Subversive Activities Control Board, supra.*

The legislative history reveals that the purpose of the immunity provision of section 4(f) was to insure the enforceability of these registration requirements by making the privilege against self-incrimination unavailable to officers and members as a defense against prosecution for failure to register.[55a]

[55a] We are not here concerned with whether the immunity conferred by 4(f) is broad enough to accomplish this purpose, but only with the question of Congressional intent.

The original Senate bill on which the Internal Security Act was based (S. 2311, 81st Cong., 1st Sess.) contained no immunity provision. However, the problem posed by the constitutional privilege against self-incrimination was raised early in the history of the legislation. John W. Davis, Esq., pointed out in a letter to the Senate Committee considering the bill that the provision for compulsory registration by individual members would compel self-incrimination under section 4(a) of the bill, making it a crime to conspire to establish a dictatorship under foreign control (Sen. Rep. No. 1365, 81st Cong., 2nd Sess. pp. 43-44).

As a result of the Davis letter and similar representations by others, the Senate Committee which had the bill under consideration added an immunity provision as section 4(f). This section of the bill provided that neither the holding of office nor membership in a Communist organization should constitute a violation of section 4(a) or 4(c) of the Internal Security Act (*id.*, p. 2). The Senate version, however, made no reference to "any other criminal statute."

The minority of the Senate Committee which reported out the bill stated in a minority report that the immunity given by section 4(f) was entirely indequate to bar an assertion of the privilege against self-incrimination as a defense to a prosecution for failure to register. The minority pointed out that the problem of self-incrimination inherent in the registration requirement was created not only by sections 4(a) and 4(c) of the Internal Security Act, but by the membership clause of the Smith Act as well. Referring to the wording of section 4(f) in the Senate bill, the minority report stated:

> "It is clear that this provision is an inadequate substitute for the constitutional privilege against self-incrimination * * *. And, of course, section 4(f) does not even purport to avoid self-incrimina-

tion in relation to the membership clause of the Smith Act." Senate Report No. 2369, Part 2, 81st Cong., 2d Sess., 12-13.

The same criticism of section 4(f) was made in the floor debate by Senators Kefauver, Humphrey and others (96 Cong. Rec. 14479, 15198).

Section 4(f) as reported out by the House Committee likewise limited the grant of immunity to prosecutions under sections 4(a) and 4(c) of the bill itself (96 Cong. Rec. 13752). In the course of the floor debate, Representative Celler read a letter from the Attorney General calling attention to the problem of self-incrimination created by the registration provisions of the bill. He then pointed out that the wording of section 4(f) in the pending bill would not resolve this problem since it did not grant immunity from prosecution under the membership clause of the Smith Act (96 Cong. Rec. 13739). It was only after this warning that the House amended the section by adding the phrase "or of any other criminal statute," which appears in the act as passed (96 Cong. Rec. 13761).

It is clear from the foregoing that Congress believed that the Fifth Amendment privilege compelled it to choose between the registration provisions of the Internal Security Act and the membership clause of the Smith Act as the means for dealing with Communist Party members whose only overt act is that of membership in the organization. After lengthy deliberation, it chose the former, and therefore amended section 4(f) in a manner which it believed would immunize Communist Party members from prosecution under the membership clause of the Smith Act.

That this was the result that Congress intended and thought it had accomplished by section 4(f) is confirmed by the legislative history of the Communist Control Act of 1954. That Act had its origin in S. 3706, a bill to amend the Internal Security Act by making provisions with respect to so-called "Communist-infiltrated organizations"

(100 Cong. Rec. 14208). At the inception of the Senate debate on this bill, an amendment was offered by Senator Humphrey (*ibid.*) which was later adopted by the Senate as an addition to the original bill (*id.*, p. 14234). The Humphrey amendment was prefaced by a Congressional finding reciting in substance that the Communist Party has for its purpose the violent overthrow of the Government (*id.*, p. 14208). The heart of the Humphrey amendment was contained in section 3, which read as follows (*ibid.*):

> "Whoever knowingly and wilfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure or overthrow of the Government of the United States, or the government of any state or political subdivision thereof, by the use of force or violence, *with knowledge of the purpose or objective of such organization*, shall upon conviction be punished as provided by the penalty provisions of Section 15 of the Subversive Activities Control Act of 1950 (50 U. S. C. 794)." (Emphasis added.)[56]

[56] The fact that knowledge of the alleged purpose of the Communist Party was an element of the defense defined in the Humphrey amendment is not only apparent from its text but was confirmed by the author in explaining his proposal in the floor debate: *"The language is quite plain.* Of course, it is predicated, as set forth in section 2, upon the findings of fact, which findings of fact already label the Communist Party as a conspiratorial force dedicated to the overthrow of the Government of the United States. Therefore, section 3 provides that whoever knowingly or wilfully becomes and remains a member *and has knowledge of the purposes and the objectives of such organization* ipso facto automatically becomes subject to the penalties. * * * How one thinks is entirely his own business. But if he maintains membership in an organization, and maintains it knowingly and willingly, and becomes and remains a member of an organization which has as its objective the overthrow of the government of the United States, *and does this with knowledge of the purposes of the organization*, then he is subject to the penalty." (100 Cong. Rec. 14232; emphasis supplied.)

Thus, the Humphrey amendment made membership in the Communist Party, when accompanied by knowledge of its alleged illicit purpose, a crime punishable by the penalties provided in section 15 of the Internal Security Act—*i.e.*, by imprisonment of not more than 5 years or a fine of not more than $10,000. Accordingly, the crime which the Humphrey amendment proposed to create was identical with the crime charged in the indictment.

The Humphrey amendment precipitated a bitter controversy both within Congress and between the Administration and the Congressional proponents of the amendment. The Administration and the Congressional leadership opposed the amendment on the ground that it would destroy the effectiveness of the Internal Security Act. They argued repeatedly and at length that the Humphrey amendment would repeal an essential provision of section 4(f) of that Act and permit the successful assertion of the privilege against self-incrimination as a defense to a prosecution for failure to register.

This position was stated and restated throughout the debate by many Senators and Representatives, including Senator Butler, the author of S. 3706, Senators Ferguson and McCarran, co-authors of the Internal Security Act, Representative Reed, Chairman of the House Judiciary Committee, and Representative Halleck, the Majority leader (100 Cong. Rec. 14211, 14222-23, 14566, 14578, 14643, 14652, 14658, 14723, 14850). All of these Senators and Representatives stated that they not only spoke for themselves but were expressing the views of the Attorney General and the Administration. Excerpts from four typical statements are contained in Appendix C.

Congress accepted and acted upon the representations and arguments of its leaders. It revised the Humphrey amendment, and enacted a law which eliminated all criminal sanctions for membership in the Communist Party. (See sections 3 and 4 of the Communist Control Act of 1954; 50 U. S. C. 842, 843.)

It is plain that the debate and the action of Congress on the Humphrey amendment were predicated on the assumption that section 4(f) of the Internal Security Act prohibits the prosecution of Communists under the membership clause of the Smith Act. If Congress had believed prosecution under that clause permissible notwithstanding section 4(f), the controversy around the Humphrey amendment would have been pointless. For the controversy and its resolution were based on the proposition that membership in the Communist Party with knowledge of its alleged illicit purpose is not now a crime and should not be made a crime.

The opinion below, quoting from the opinion in *Scales*, holds that the crime charged in the indictment is not within the immunity conferred by section 4(f) because membership "per se" does not embrace membership in the Communist Party when accompanied by knowledge that the organization advocates proscribed doctrine (R. 633-34). Neither opinion attempts to reconcile this construction of 4(f) with the reference it makes to "any other criminal statute" or with the legislative history which we have described.

The courts below (R. 634) also relied on the savings clause of the Internal Security Act (50 U. S. C. 796) to support their conclusion. The clause provides that the Act "shall be construed as being in addition to and not in modification of existing criminal statutes." These words, however, do not nullify the reference in section 4(f) to "any other criminal statute." It is a familiar principle of statutory construction that specific provisions prevail over general language used in the same statute. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 207. Accordingly, a general saving clause cannot override express provisions found in the body of the enactment. *United States* v. *Yuginovich*, 256 U. S. 450, 463; *United States* v. *Ginn*, 222 F. 2d 289, 290-91. The rule of the latter cases has special pertinence here where the reference to "any other crimi-

nal statute" was added by a last minute floor amendment when Congress obviously had no opportunity to consider the possible inconsistency between these words and the savings clause which was contained in the bill as reported out of committee.

VII. The findings of the Communist Control Act with reference to the Communist Party deprived the petitioner of the right to a fair and impartial trial.

Section 2 of the Communist Control Act (50 U. S. C. 841) "finds and declares that the Communist Party of the United States is in fact an instrumentality of a conspiracy to overthrow the government of the United States." It further finds that the Communist Party "gives scant indication of capacity ever to attain its ends by lawful means" and is dedicated "to the proposition that the present constitutional government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence." The section concludes with the declaration that, "therefore the Communist Party should be outlawed."

Section 3 of the same act (50 U. S. C. 842) refers to, "The Communist Party of the United States or any successor to such Party, regardless of the assumed name, whose object or purpose is to overthrow the government of the United States * * * by force and violence." The section then provides that "whatever rights, privileges and immunities which have heretofore been granted to said Party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof are hereby terminated."

Section 4 of the Act (50 U. S. C. 843) refers to persons who knowingly and wilfully become or remain members of the Communist Party or "any *other* organization having for one of its purposes" the violent overthrow of the government (emphasis supplied).

Thus, each of the three sections contains a specific finding by the Congress that the Communist Party advocates the violent overthrow of the government. It was because of the asserted truth of this finding that Congress declared the Communist Party to be an outlaw organization and stripped it of all rights, privileges and immunities.

One element of the offense charged in the indictment, as construed by the trial court (see *supra*, p. 75), is that the Communist Party advocates the violent overthrow of the government. The petitioner was entitled to a fair and impartial jury trial of this, as of every other, issue of fact. This issue, however, was predetermined by Congress in the Communist Control Act. A fair and impartial jury trial was therefore impossible.

The essence of the trial guaranteed by the Constitution consists of the freedom of the trier of fact to reach an independent, objective and impartial verdict on the evidence. *Moore* v. *Dempsey*, 261 U. S. 86; *Frank* v. *Mangum*, 237 U. S. 309, 335. As stated in *Mooney* v. *Holohan*, 294 U. S. 103, 112, the due process clause "is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial * * *." And in *Manley* v. *Georgia*, 279 U. S. 1, 6, it was stated that, "Mere legislative fiat may not take the place of fact in determination of issues involving life, liberty or property."

Here, the findings of Congress in the Communist Control Act in essence "contrived conviction through the pretense of a trial." For it can scarcely be contended that a jury which is presumed to know the law will ignore statutory findings which bluntly tell it that the Communist Party is an outlaw organization dedicated to the use of force and violence for the overthrow of the existing government. This was one of the questions of fact which the jury was supposed to examine at the trial on the basis of the evi-

dence.[57] But in the face of the finding made by Congress and approved by the President, it would be naive to suppose that the jury would even consider the question *de novo*, much less make a contrary finding.

The court below held that any damage from the Congressional findings could have been discovered on the *voir dire* examination of the jurors and was cured by the instructions (R. 633). But neither *voir dire* questions nor trial court instructions which made specific reference to the Communist Control Act could have overcome the prejudicial effect of the legislation. Quite the contrary, they would have resulted only in specifically directing the attention of the jurors to it. Cf. *Delaney* v. *United States*, 199 F. 2d 107, 112.

The court below correctly stated our position to be that there cannot be a valid trial of a Communist under the membership clause unless and until the pertinent sections of the Communist Control Act are either repealed or invalidated (R. 633). Congress cannot have its cake and eat it. It cannot declare a named organization to be engaged in criminal conduct and simultaneously preserve the right to a fair trial of the precise issue which it has predetermined by fiat.

In fact, Congress had no reason to believe that enactment of the Communist Control Act would give rise to this dilemma. For when it passed that statute, it was of the opinion that the prosecution of Communists under the membership clause had already been barred by section 4(f) of the Internal Security Act (see *supra*, p. 80). If it was correct in that opinion, the indictment must be dismissed without reaching the question of the fairness of the trial. But if the Court finds otherwise, the conviction must be reversed because the findings of the Communist Control Act made a fair trial impossible.

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[57] As we have shown, the only admissible evidence on this issue is evidence of facts within the knowledge of petitioner (see *supra*, p. 67).

Conclusion

The conviction and the affirmance below would have been almost unthinkable before the decisions in *Dennis* and in the Smith Act conspiracy cases which followed in its wake.[58] We believe that the *Dennis* case was wrongly decided. We share the hope expressed by Mr. Justice Black (at 581), "that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." But whatever the ultimate fate of the decision in *Dennis* may be, it cannot and should not be extended, in the calmer times we have already begun to experience, to sustain the constitutionality of the membership clause. And in no event can it furnish a warrant for the affirmance of a conviction on a record devoid of evidence of illicit advocacy, incitement to violence, or seditious knowledge or intent, in a period when the relaxation of international tensions holds out the hope of lasting peace.

The judgment below should be reversed with directions to dismiss the indictment or enter a judgment of acquittal.

Respectfully submitted,

JOHN J. ABT,
11 Park Place,
New York 7, N. Y.,
Attorney for Petitioner.

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[58] This appears to have been the view of the experienced trial judge. See R. 472-73, 480-81.

APPENDIX A

Statutes Involved

1. Section 2 of the Smith Act, 18 U. S. C. 2385:

Whoever knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

2. Section 4(f) of the Internal Security Act, 50 U. S. C. 783(f):

Neither the holding of office nor membership in any Communist organization by any person shall constitute per

se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

3. Sections 2, 3 and 4 of the Communist Control Act, 50 U. S. C. 841-43:

Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and

gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any

other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivisions of any such organization, whether or not any change is hereafter made in the name thereof.

APPENDIX B

Summary of the Testimony Concerning Meetings Addressed or Attended by Petitioner [1]

November 30, 1945: (Czarnowski, R. 346-47). The petitioner was present but did not speak. The witness testified that Gil Green, then state chairman of the Communist Party of Illinois, said, "that the national committee had arrived at a decision that Communist veterans who have left the service should infiltrate the American Legion and Veterans of Foreign Wars, and take over the leadership of these organizations, and he said that Hitler has taken over, has taken over the government of Germany by the aid of veterans."

1946: (Herron, R. 43-44). The witness testified that the petitioner was a speaker and said "that he had been wrong in not wanting to organize the Party more, and he felt that they should get out to organize, especially on the South Side, and that they should challenge Harlem in New York to see if they couldn't get more members than Harlem could."

1946: (Czarnowski, R. 347-48). The witness testified that the petitioner spoke and, "referred to the international situation in 1917 and 1921 and he said that the labor movement at that time was more militant, but that the revolutionary movement did not succeed in all movements because of such as we had here, Reuther, Walter Reuther and Livinshky,[2] with the exception of Russia, but the revolution succeeded under the wise leadership of Lenin and Stalin."

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[1] Unless otherwise indicated, each of the meetings was held in Chicago. The name of the witness and the appropriate record reference is indicated immediately after the date of each meeting.

[2] Reuther was a child in 1917. "Livinshky" was not otherwise identified by the witness.

April 24, 1947: (Czarnowski, R. 348-50). The petitioner did not speak. The meeting was addressed by one Ed Starr (not otherwise identified) and one Andy Neuhoff, identified by the witness as a Communist functionary. The witness testified that Neuhoff said that, "the veterans are very important force, and this can readily be seen in the American Legion and Veterans of Foreign Wars. He said that as Dick Crowley told him, the veterans, and especially those who had taken part in battles and won battle stars, cannot very readily be accused of being un-American. Even admitted Communists, an admitted Communist can say 'And where in the hell were you? I was there. Is that un-American.' And then it was said that Communists have a better opportunity, or have the advantage of being a spearhead to infiltrate unions and take over the leadership of unions, and the labor movement in general."

According to the witness, Ed Starr "confirmed the statement made by Neuhoff, saying that it must be recognized that the veterans constitute a very important force, and this can readily be seen in what use Hitler and Mussolini made of their veterans' organizations."

July 16, 1947: (Czarnowski, R. 350-51). The witness testified that the petitioner was a speaker and said "that he and several others were called before the investigating committee and were told to bring in the files of the Communist Party. And he told the functionaries they would play hell before they would get those files. • • • He said about functionary—I mean leaders of communities that feel safe to work in the communities as Communists, they should come out as such. However, if a Communist feels—a leader, feels that it is not safe to come out in the open as a Communist, he should stay under cover until such time when it is safe to come out without jeopardizing his position as a leader in that community."

September 11, 1947: (Czarnowski, R. 351-52). The occasion of the meeting was the 100th anniversary of Marxism.

The petitioner did not speak. Gil Green and John Gates, a member of the national committee of the Communist Party addressed the meeting. According to the witness, Gates "reviewed the history of the Communist Party from the time of Marx and Engels to that date, and he said, referring to the revolution—Russian revolution, he said that in 1916 there was one Czar and one Pope. The Bolshevik revolution liquidated the Czar but the Pope is still here. He said that Communism is a science and Communists do not believe in prayer to reach their objectives. They believe in concrete work of getting there. * * * He then quoted Lenin that it will take many years of hard work to establish proletarian governments in the world and referring to a statement made by Claude Lightfoot he said that that of establishing a proletarian government in the United States * * * [sic.]. He said that the European—Western European nations are puppets of the United States; and that sooner or later they will overthrow their regimes and establish democratic peoples forms of government under the guidance of the Soviet Union." According to the witness, Green "praised the Soviet Union. He said that the Soviet Union is a powerful nation today and a leader in world affairs, to be reckoned with, that we should be proud to be Communists, and that he hopes that the next anniversaries—now I don't remember what he said, 150th, 200th anniversary, the next anniversary he hopes to celebrate the Marxism in the United States and the Soviet Republic of the United States."

November 27-30, 1947: (Czarnowski, R. 352-54). The occasion was the state convention of the Communist Party. The petitioner was elected to the state board. Green spoke and "pressed the importance of education in Marxism-Leninism for members of the Communist Party. He said that the unions are falling into the hands of the Social Democrats; that Party members should take a more active part in the unions. * * * He said that Truman is following

an imperialistic foreign policy; that the Marshall Plan was originally created to feed hungry people, but that it is being used against—to rearm fascist forces against the Soviet Union; Greece and China are examples of peoples' struggle against British and American imperialists."

March 21, 1948: (Czarnowski, R. 355). The petitioner spoke, but the witness could not recall what was said.

August, 1948: (Cummings, R. 437-38). The occasion was a national convention of the Communist Party in New York City. The petitioner sat on the platform, presided at one session and made a report. The witness was not asked and did not testify as to what was said by the petitioner or any other speaker.

November 20, 1948: (Czarnowski, R. 356-60). The occasion was a state convention of the Communist Party. The petitioner spoke, but the witness did not recall what was said. Petitioner was elected as one of a three member "regional organization of shop branches," the purpose of which was to organize Communist Party branches in various shops, particularly in basic industries.

August 26, 1950: (Czarnowski, R. 361). The occasion was the birthday of Elizabeth Gurley Flynn, a member of the national committee of the Communist Party. The petitioner was the chairman and a speaker, but the witness did not testify as to what he said: According to the witness, Miss Flynn, who spoke, "expressed a hope to live long enough to see world Socialism."

November 10, 1950: (Czarnowski, R. 362-64). The occasion was the 33rd anniversary of the Russian Revolution. The petitioner spoke, and G. Ex. 63 contains his speech. According to the witness, the petitioner said that the revolution "was brought about by the lower class to oust the upper class under the wise leadership of Lenin and Stalin. * * * And he said that the capitalists cannot get along without—capitalist countries cannot get along without wars.

* * * He said that this generation went through two wars and that Washington is planning a third world war."

February, 1951: (Ondrejka, R. 305-07). The occasion was a celebration of Negro history week in Milwaukee. According to the witness, the petitioner, the principal speaker, "traced the movements of the Negro peoples from the time of the American revolution thru the Civil War to the present day" and said that from the Civil War "until the Communist Party had taken up the fight for the Negro people, nothing had been done for the Negro peoples in the United States, and without the Communist Party there could be no gains for the Negro peoples." The petitioner also "traced back about the Congressional investigations, and the fact he had been called before a legislative committee of the Illinois Legislature as to his activities. At that time he had mentioned the fact that they could do him nothing nor could the Congressional investigations of the United States stop our Party from advancing forward."

May 26, 1951: (Czarnowski, R. 334-35). The occasion was a testimonial dinner to the petitioner at which, according to the witness, he said, "that he had joined the Communist Party because the Communist Party is fighting for the rights of the Negro people, and only the Communist Party can give them freedom and equality. He accepts this elevation to the highest office in the Communist Party, to the National Committee, as an elevation of the Negro people."

June, 1951: (Ondrejka, R. 307-10). The meeting was addressed by Green and the petitioner. According to the witness, Green stated that he was about to go to jail and "stressed the fact that it is the time for the people in the Communist Party, especially those that held a white-collar position, to take off their white collars and go into the ranks of labor. * * * * At that time he had said that we must unite ourselves with labor in such a way that we become

a part of the labor movement and be indistinguishable from it." The witness testified that the petitioner said that "by taking off the white collar" and going into the working class movement "we would be following the Marxian line and furthermore, we would be doing an honor to Gil Green, now that he was going to prison."

June 11, 1951: (Czarnowski, R. 370-72). The meeting was addressed by Green and the petitioner. According to the witness, Green said "that we must mobilize the people for a peace movement, and Party members should contact labor union leaders, church leaders, and civic leaders to stir them into a peace movement. He said 'If we cannot prevent war, we must at least delay it for time is on our side.'" The witness testified that the petitioner addressed Rev. Father Frank Parker as "Comrade Reverend Parker," and referring to the story of David and Goliath said "our slingshots are not as big as the weapons our enemies are using, but we will win at the end in spite of it." The witness further stated that by "our enemies" the petitioner was referring "to the reactionary forces in the United States." The meaning concluded with the singing of the *International.*

APPENDIX C

Excerpts from the Congressional Debate on the Communist Control Act

House Majority Leader Halleck (100 Cong. Rec. 14850):

> "I have as quickly as I could and as well as I could examined the language of this amendment. *As I read it, it does undertake to make membership in the Communist Party a felony per se* • • •. Again may I point out, as I and others pointed out yesterday, that if you make membership in the Communist Party per se a felony, then to require them to register, which is the requirement of the Internal Security Act, would require them to provide evidence incriminating themselves, and thus necessarily would excuse them from compliance with the act. The appeal that is pending now in the circuit court of appeals to determine the validity of the Internal Security Act of 1950 would be immediately written off. They will be in there with a petition to remand the case and it will be remanded. Do not scoff at that. That is the exact fact. *That is the position taken by the Attorney General, by the Director of the F.B.I., J. Edgar Hoover, and by the lawyers who have studied the matters.*" (Emphasis supplied.)

Representative Reed, Chairman, House Judiciary Committee (*id.*, p. 14643):

> "Section 3 of the bill, as it passed the Senate, merely provided that one who remained, or became a member of the Communist Party or organization advocating the overthrow of the Government, by force or violence, with knowledge of that purpose, and who committed an overt act in furtherance of those objectives was subject to a criminal penalty.
>
> "*That provision, as it passed the Senate, destroyed the very effective Subversive Activities Control Act of 1950, which specifically provided that*

membership in the Communist organization was not per se a violation of any criminal statute. Such provision was written into the law in order that the registration and filing requirements operate effectively to control these Communist groups. Otherwise, they could have pleaded their privilege against self-incrimination and thereby avoid the requirements of the statute. The Senate version would have destroyed the very effective requirements of the Internal Security Act and would thus have defeated the very purpose for which it was written." (Emphasis supplied.)

Senator Ferguson, a co-author of the Internal Security t (*id.*, p. 14723):

"Here we are creating a new crime, the crime of knowingly and willfully becoming or remaining a member of the Communist Party or an organization which is described in the bill. The section continues and defines what a member is.

I submit to the Senate this plain question: Does the Senate desire at this time to repeal the Internal Security Law which was passed in 1950, which was vetoed by the President of the United States, and which was passed over the veto of the President of the United States in the House of Representatives and in the Senate? Do we desire today, by this vote, to repeal the real keystone of the arch in that legislation? If we do, then we should vote for this amendment.

If we vote for this amendment, we cannot have registration of Communists, because to require a man to testify against himself by registration would be violating the Constitution of the United States. There is no law of the land which would require a man to violate that provision of the Constitution and register, if there was a law making it a felony, as is sought to do by this amendment, to be a member or knowingly to remain a member of the Communist organization."